



Frequently Asked Questions

May 2015

Strengthening Organisational Governance: new incorporation requirements

Why is the Government introducing these changes?

The Australian Government is committed to ensuring the highest quality of services for Aboriginal and Torres Strait Islander Australians. An important step in achieving this is to ensure organisations receiving Australian Government funding to deliver Indigenous programmes have high standards of governance and accountability.

What does organisational governance mean?

Governance refers to the processes by which organisations are directed, controlled and held to account, encompassing authority, accountability, stewardship, leadership, direction and control exercised in the organisation.

Effective governance ensures that the organisation's committee, its staff and its members are collectively accountable for the organisation's plans, decisions, actions and results. Conversely, ineffective governance impacts on the capacity of organisations to meet the needs of Aboriginal and Torres Strait Islander people, the quality of service, and the achievement of agreed deliverables.

State and territory incorporation legislation is intended for small organisations and often does not provide the regulatory structure or resources to respond to governance issues in organisations. Incorporation under Commonwealth legislation provides a more robust regulatory framework and access to specialist assistance that helps to improve public confidence in the security and delivery of services.

What are the new requirements?

From 1 July 2014, all organisations receiving grants of \$500,000 (GST exclusive) or more in any single financial year from funding administered by the Indigenous Affairs Group within the Department of the Prime Minister and Cabinet are required to:

- incorporate under Commonwealth legislation – Indigenous organisations will be required to incorporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; with other organisations incorporating under the *Corporations Act 2001*; and
- maintain these arrangements while they continue to receive any level of such funding.

Grants for capital works and funding sourced through procurement activities are not included.

Statutory bodies, government bodies, and organisations operating under a specific piece of legislation are excluded from the requirements and do not have to apply for an exemption.

Indigenous organisations already incorporated under the *Corporations Act 2001* do not have to change their incorporation status.



All new Indigenous organisations (those not previously incorporated) must be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* so they can access the assistance and support available to meet the needs of Indigenous Australians under the Act.

The Minister may review these exclusions at any time, including considering requirements for individual organisations. Affected organisations will be notified of any changes.

How does this benefit organisations?

The advantages of incorporation under the *Corporations Act 2001* or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* include:

- the members can choose not to be liable for the debts of the organisation;
- companies and corporations can operate nationally without further registration - they are not limited to the state or territory in which they are registered;
- modern legislation incorporating world best practice in terms of corporate governance and corporate regulation; and
- greater protections and rights for members and creditors.

In addition to these, in administering the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, the Office of the Registrar of Indigenous Corporations provides:

- advice for Indigenous groups on how to become corporations;
- assistance so that Indigenous corporations can understand, create and adopt their own rule book according to their needs and values;
- support services, advice and corporate governance training;
- public information about corporations;
- assistance to corporations with complaints; and
- mediation and dispute resolution services.

These additional supports are provided exclusively under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* meet the specific needs of Indigenous people.

The Australian Government encourages all organisations providing services for Indigenous Australians, irrespective of their level of funding, to incorporate under appropriate Commonwealth legislation.

How do organisations comply?

Organisations receiving grant funding above the threshold will need to incorporate, or remain incorporated, under Commonwealth legislation. Indigenous organisations must be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, unless they are excluded from the requirements, with all other organisations incorporated under the *Corporations Act 2001*.

Typically, organisations may have to change their constitution or rule book to incorporate under the Commonwealth legislation. This usually requires the organisation's membership to approve the transfer of incorporation at an Annual or Special General Meeting.

How will these requirements be phased in?

The requirements will apply to organisations with new funding agreements with a start date of 1 July 2014 or later. Clauses covering the requirements will form part of the funding agreements and organisations will have six (6) months to comply with the requirements from the execution of the funding agreement.



No organisation receiving funding granted prior to 1 July 2014 will be affected until any funding agreements established before that date expire or are renegotiated (and obtain new funding above the threshold in any single financial year). The requirements would then be in their new funding agreement.

What happens if an organisation doesn't comply with these requirements?

The Government will be encouraging all organisations providing services for Indigenous Australians, irrespective of their level of funding, to adopt these measures.

For organisations receiving grants of \$500,000 (GST exclusive) or more in any single financial year from funding administered by the Indigenous Affairs Group within the Department of the Prime Minister and Cabinet, the requirements will be built into programme guidelines and organisations' funding agreements. Organisations will be expected to comply with the requirements within the transition period should an exemption not be granted.

Non-compliance with the requirements will constitute a breach of the funding agreement and may result in the termination of the funding agreement. Breaches against funding agreements may be taken into consideration as part of a risk assessment for future funding.

What if an organisation wants to comply, but is unable to quickly re-incorporate?

Extended transition periods can be granted to organisations who can demonstrate that they have made reasonable attempts to, but are unable to meet this requirement at that time. The organisation will need to demonstrate that they are willing to make the changes but that they have not been able to comply.

What if complying with the requirements will impact my organisations' ability to deliver our services?

The Minister for Indigenous Affairs, or an approved delegate, may provide an exemption from the requirements where an organisation can demonstrate at least one of the following:

- That grant funding received from the Indigenous Affairs Group within the Department of the Prime Minister and Cabinet is a small portion of its total revenue, and as such changing incorporation status may unfairly impose additional requirements on its operations and business model.
- It is required to incorporate under specific non-Commonwealth legislation as part of its licensing arrangements or funding received through other sources.

Applications will be considered on a case-by-case basis, and will take into consideration information demonstrating that the organisation is well-governed, high-performing and low risk; and may draw on performance and risk information held by the Department in relation to past funding agreements.

Applications should be lodged through your funding agreement manager in your Regional Department of the Prime Minister and Cabinet Office within the transition period, as soon as practical once an offer of funding has been made. Organisations are responsible for providing sufficient information to support their application.

Are there any costs associated with the requirements?

The Office of the Registrar of Indigenous Corporations does not charge fees for incorporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* and can provide additional support for Indigenous organisations transitioning their incorporation status.



Free legal advice about transferring incorporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* is available for Aboriginal and Torres Strait Islander organisations through the LawHelp pro bono legal assistance scheme provided by the Office of the Registrar of Indigenous Corporations. More information is available at '[ORIC LawHelp](#)'.

Incorporation under the *Corporations Act 2001* carries a registration fee of up to \$457.

Organisations may incur some additional one-off costs for independent legal advice and accountancy services to support the transfer of incorporation. To assist organisations required to transfer their incorporation status, the Department will provide a one-off \$10,000 payment from the granting activity upon receipt of evidence that the transfer has occurred.

What is the difference between a grant and procurement?

A grant is an arrangement for the provision of financial assistance by the Commonwealth:

- a) under which public money is to be paid to a recipient other than the Commonwealth
- b) which is intended to assist the recipient achieve its goals
- c) which is intended to help address one or more of the Australian Government's policy objectives
- d) under which the recipient may be required to act in accordance with specified terms or conditions.

Procurement encompasses the whole process of procuring goods and services. In addition to the acquisition of goods and services by an agency for its own use, procurement includes the acquisition of goods and services on behalf of another agency or a third party.

Our organisation receives grants from several Departments. Do we have to comply?

The Australian Government will be encouraging all organisations that provide services for Indigenous Australians, irrespective of their level or source of funding to adopt these measures.

How do you classify Indigenous organisations?

Organisations would be deemed to be Indigenous organisations if they are able to meet the Indigeneity requirement under *Section 29-5* of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

This means that a corporation must have the required number or percentage of members who are Aboriginal and/or Torres Strait Islander people. The requirements for different size corporations are:

- in a corporation with five or more members, 51 per cent of the members have to be Aboriginal or Torres Strait Islander people
- in a corporation with fewer than five members but more than one member, all of the members, or all but one of the members, have to be Aboriginal or Torres Strait Islander people
- in a corporation with only one member, that member has to be an Aboriginal or Torres Strait Islander person.

Corporations will also need to meet the majority of directors requirement at *Subsection 246-5(1)* of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. That



subsection provides that a majority of the directors of an Aboriginal and Torres Strait Islander corporation must be individuals who are Aboriginal and Torres Strait Islander persons.

Our organisation provides services to both Indigenous and non-Indigenous Australians. Are we affected by these requirements?

The new requirements apply to all funding administered by the Indigenous Affairs Group within the Department of the Prime Minister and Cabinet. Individual programme guidelines will provide further information on the requirements.

What help can the Registrar of Indigenous Corporations provide?

Indigenous organisations can access client assistance, support, and information and training programmes offered by the Office of the Registrar of Indigenous Corporations (ORIC).

ORIC assists organisations with their registration under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. This can extend to assistance with required paperwork; the drafting and development of corporation rule books and best-practice governance structures; and attendance at meetings of members.

ORIC provides support through corporate governance training programmes that are available to directors, members and staff of all Indigenous organisations. Corporate governance training sessions are held in locations throughout Australia and are run on a regular basis. Corporation-specific training is tailored to suit the needs of the individual organisation and can be held at the corporation's premises. ORIC also maintains a number of information resources for corporations such as factsheets and resource guides. These resources are available on ORIC's website at '[Office of the Registrar of Indigenous Corporations](#)'.

Will the transfer to incorporation under Commonwealth legislation affect our organisations status as a registered charity?

The charitable status of an organisation should not be affected by a transfer of its incorporation to the *Corporations Act 2001* or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. For example, Section 42-3 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* states that a transfer of registration to the Act does not create a new legal entity or affect the body's existing property, rights or obligations.

However, the circumstances of every organisation will be different and each organisation should seek their own legal advice. Further information can also be obtained from the independent national regulator of charities, the Australian Charities and Not-for-profits Commission (ACNC). Further information is available at the ACNC website '[ACNC](#)'. Alternatively organisations can contact the ACNC on 13 22 62 or via email at advice@acnc.gov.au.

The ACNC has entered into memoranda of understanding (MOUs) with the Australian Securities and Investments Commission (ASIC) and the Registrar of Indigenous Corporations regarding the reporting and regulation of charities under the *Corporations Act 2001* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. Details of the MOUs are available at:

- '[ASIC/ACNC MOU](#)'
- '[Registrar of Indigenous Corporations/ACNC MOU](#)'