



Review of the operation of the
*Australian Charities and Not-for-profits
Commission Act 2012 (Cth)* and the
*Australian Charities and Not-for-profits
Commission (Consequential and
Transitional) Act 2012 (Cth)*

Submission to the Review from the
Australian Charities and Not-for-profits
Commission

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Executive Summary

The Australian Charities and Not-for-Profits Commission (ACNC) welcomes this opportunity to make a submission to the ACNC Review.

The terms of reference for the review require the Review Panel to evaluate the suitability and effectiveness of the ACNC Acts, and in particular to:

1. Examine the extent to which the objects of the ACNC Acts continue to be relevant.
2. Assess the effectiveness of the provisions and the regulatory framework established by the ACNC Acts to achieve the objects.
3. Consider whether the powers and the functions of the ACNC Commissioner are sufficient to enable these objects to be met.
4. Consider whether any amendments to the ACNC Acts are required to enable the achievement of the objects and to equip the ACNC Commissioner to respond to both known and emerging issues.

The Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth) (ACNC (C&T) Act) requires a review to be undertaken of the first five years of the operation of the *Australian Charities and Not-for-profits Commission Act 2012 (Cth) (ACNC Act)* and the *ACNC (C&T) Act*.

Accordingly, the ACNC has considered the terms of reference in the light of the ACNC's experience of administering the legislation during this period, but has also assessed the suitability and effectiveness of the legislation having regard to the areas of focus for the ACNC in its next phase.

Subject to the constitutionally-based limitations described in section 1, paragraphs 1.23 to 1.33 of this submission, and bearing in mind that the regulatory framework has only applied to charities during the period under review, the ACNC considers that the ACNC legislation is generally operating effectively to achieve its objects, but there are areas where improvements could be made.

Accordingly, this submission recommends changes to the ACNC legislation that the ACNC considers would:

- (a) Enhance the effectiveness of the regulatory framework;
- (b) Increase the accountability and transparency of charities by ensuring the public has access to relevant information on the ACNC Register;
- (c) Better enable the achievement of the objects of the ACNC Act; and
- (d) Within constitutional constraints, ensure that the ACNC Commissioner has sufficient powers to meet those objects.

The matters that the ACNC recommends for consideration by the Review Panel are enumerated in the following section.

Recommendations for matters to be considered by Review Panel

1.	Consider whether measures could be introduced at the Commonwealth level to protect a charity's accumulated charitable income and assets after its ACNC registration has been revoked.
2.	Consider adding the following objects in s15-5 of the ACNC Act: (a) To promote the effective use of the resources of not-for-profit entities; and (b) To enhance the accountability of not-for-profit entities to donors, beneficiaries and the public.
3.	Consider whether a statutory definition of 'not-for-profit' should be introduced for the purposes of the ACNC Act and the Charities Act.
4.	Amend s 40-5 of the ACNC Act and s 40.1 of the ACNC Regulation (as appropriate) to include the additional data items described in paragraph 4.5.
5.	Amend s 40-5 of the ACNC Act to give the Commissioner a discretion to: (a) extract information from a registered charity's AIS and display it on the face of the Register entry for the charity; and (b) display information on the Register in text or in a graphical format.
6.	Consider amending the ACNC Act to authorise the Commissioner to collect and display on the Register information provided voluntarily by a registered charity for that purpose where the information would assist the public to understand the structure, operations or impact of the registered charity.
7.	Consider whether the ACNC Act should be amended to require registered charities, other than trusts and BRCs, to have a minimum number of three responsible persons, and at least two responsible persons who ordinarily reside in Australia, with the Commissioner having the power to exempt entities should there be special circumstances where different governance arrangements are appropriate.
8.	Amend the ACNC Act to expressly authorise the Commissioner to collect: (a) the personal details (as defined in the Corporations Act) of responsible persons at the point of registration and to require registered charities to provide the personal details of a person who becomes a responsible person after registration; and (b) information about the involvement of a responsible person in unlawful activity (including that a responsible person has been convicted of a criminal offence) from a person other than the responsible person where the collection of the information is reasonably necessary for the purposes of determining whether an entity is entitled to be registered as a charity or for the purposes of

	determining whether a registered charity has contravened the Act or failed to comply with the governance standards or the external conduct standards.
9.	Amend s 45.20(3) of the ACNC Regulation to include the following suitability conditions to be a responsible person: (a) that the person does not have a ‘disqualifying conviction’ for a terrorism, terrorism financing or money laundering offence under Commonwealth, State or Territory law; and (b) that the person does not have a ‘disqualifying conviction’ for a ‘relevant offence’, being an offence that is relevant to the operation of the charity.
10.	Amend the ACNC Act to give the Commissioner a discretion to publish the reasons for decision on an application for registration where the Commissioner considers that it would be in the public interest to do so.
11.	Amend s 40-5 of the ACNC Act to provide that the ACNC Register is to include the grounds under s 35-10(1) on which a decision to revoke a charity is based, and a summary of the reasons for revocation.
12.	Amend Subdivision 150-C of the ACNC Act to provide that ACNC officers are authorised to disclose protected ACNC information for the purpose of making a public comment or publishing information about the Commissioner’s regulatory activities when it is in the public interest to do so. Specifically, this may include confirming that an investigation has been commenced, disclosing action that the ACNC has taken or is proposing to take in relation to a registered charity or a responsible person and disclosing a regulatory outcome (e.g. that the ACNC and a registered charity have entered into a compliance agreement or that the ACNC has provided regulatory guidance to a registered charity).
13.	Amend subdivision 150-C – Authorised Disclosures of the ACNC Act to include a provision that expressly authorises ACNC officers to disclose protected ACNC information in bulk to an Australian government agency if the disclosure is reasonably necessary: (a) to enable data-matching, analysis or research for the purpose of assisting that agency or another Australian government agency to carry out its law enforcement or investigatory functions or activities or for the purpose of assisting the ACNC to carry out its functions; or (b) to enable the implementation of arrangements between the ACNC and other government agencies for the purpose of reducing regulatory duplication.
14.	Amend s 150-30 of the ACNC Act by replacing ‘under this Act’ with ‘in the performance of his or her duties as an ACNC officer’.

15.	Amend s 150-50 of the ACNC by removing the requirement that the disclosure be for the purposes of the ACNC Act.
16.	Consider options for addressing the issues arising from the inability to check the names of current directors and company secretaries of charitable companies by searching the ASIC register.
17.	Turn off s 195 of the Corporations Act for charitable companies and amend governance standard 4 to restrict participation in decision making with respect to the governance or management of a registered charity by a responsible person with a material conflict of interest.
18.	Amend the Corporations Act to provide clarity for charitable companies as to the requirements for a special resolution.
19.	Amend the Corporations Act to turn off the requirement to appoint an auditor in ss 327A and 327B for charitable companies, or at least for charitable companies that are small or medium registered companies.
20.	That the Commonwealth government promote the use of the ACNC's charity passport by Commonwealth, State and Territory agencies so as to reduce the regulatory burden on charities.
21.	Further work to be undertaken by the ACNC and AASB in consultation with the sector to develop a suitable reporting framework for registered charities.
22.	Consider whether registered charities should be able to self-assess their size for reporting purposes in a particular reporting period taking into account the immediately previous reporting period, or in the case of newly established charities, the projected revenue for the following reporting period
23.	Amend the ACNC Act by including an ongoing provision in Division 60 of the ACNC Act based on item 10(1)-(3) of Part 4 in Schedule 1 to the ACNC (C&T) Act.
24.	Amend the ACNC Act by including in Subdivision 60-C a provision imposing a duty on an auditor to report to the ACNC if, in the conduct of an audit of a registered charity, the auditor is aware of circumstances that: (a) they have reasonable grounds to suspect amount to a significant contravention of the ACNC Act or a contravention of the ACNC Act that has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the registered charity's responsible persons;

	(b) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit; or (c) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit.
25.	Amend the ACNC Act to give the Commissioner a discretion to permit a person who is taken to be a registered company auditor under s 324BE(1) of the Corporations Act to undertake an audit of a large registered charity if the Commissioner reasonably believes that the requirement to have the audit undertaken by an entity specified in s 60-30 (1) will impose an unreasonable burden on that charity.
26.	Amend ss 60-45(3)(b) and 60-50(3)(b) of the ACNC Act by confining the requirement to 'material' deficiencies, failures or shortcomings.
27.	Repeal s 60-95(2) of the ACNC Act so as to remove the Commissioner's power to allow collective reporting.
28.	Subject to the implications of the adoption by the AASB of the IASB Conceptual Framework for Financial Reporting in Australia, amend the table in s 60.30 of the ACNC Regulation by adding AASB 124 – Related Party Disclosures.
29.	Amend s 35-10(1) of the ACNC Act to include as a ground upon which the Commissioner may revoke a charity's registration that the registered charity has ceased to operate.
30.	Amend s 70-5 of the ACNC Act to enable the Commissioner to require an entity to provide information or documents necessary to determine whether a registered entity is a 'federally regulated entity'.
31.	Amend the note to s 75-5(1) of the ACNC Act by removing the reference to s 35-10.
32.	Consider amending the ACNC Act to require a show cause notice to be given to the relevant responsible person as well as to the registered charity before suspending or removing the responsible person and to give notice of the decision to suspend or remove a responsible person to the registered charity as well as to the responsible person.
33.	Amend s 115-55 of the ACNC Act: (a) to enable:

	<ul style="list-style-type: none"> (i) the Commissioner to delegate any function or power to any member of the staff assisting the Commissioner; and (ii) SES employees assisting the Commissioner to sub-delegate any function or power to any other member of the staff assisting the Commissioner who has the expertise to exercise the function or power being delegated; and <p>(b) to provide that in exercising a delegated or sub-delegated function or power, the delegate or sub-delegate must comply with any directions given by the delegator or sub-delegator.</p>
34.	Amend the ACNC Act to provide that late submission of an annual financial report or an additional report attracts an administrative penalty under s 175-35 of the Act.
35.	Amend the definition of 'Australian government agency' in s 300-5 of the ACNC Act to clarify whether it includes or excludes local government authorities or amend s 205-35(5)(a) of the ACNC Act to clarify whether grants from local government authorities are to be taken into account in determining whether an entity is in receipt of government grants exceeding the threshold amount.
36.	<p>Either:</p> <ul style="list-style-type: none"> (a) Amend the ACNC Act by introducing a provision of the kind referred to in s 38(1)(b)(ii) of the FOI Act; or (b) Specify Division 150 of the ACNC Act in Schedule 3 to the FOI Act.
37.	Amend s 45.25(3) of the ACNC Regulation to provide that if a registered entity is a trust with more than one responsible entity, then each responsible entity must disclose any conflicts of that responsible entity to all the other responsible entities.
38.	Amend s 45.25(2)(e) of the ACNC Regulation to add a requirement that conflicts of interest are managed appropriately.
39.	Amend s 45.150 of the ACNC Regulation to require the date of birth of the responsible person to be added to the Disqualified Persons Register.
40.	Consider whether the definition of 'government entity' in the Charities Act should be amended to increase clarity, certainty and internal consistency.



Glossary

Term	Means
Constitutional corporation (defined in s 205-20 of the ACNC Act)	<ul style="list-style-type: none"> (a) a corporation to which paragraph 51 (xx) of the Constitution applies; or (b) a body corporate that is incorporated in a Territory.
Federally regulated entity (defined in s 205-15 of the ACNC Act)	<ul style="list-style-type: none"> (a) a constitutional corporation; or (b) a trust, all the trustees of which are constitutional corporations; or (c) a body corporate that is taken to be registered in a Territory under section 119 A of the <i>Corporations Act 2001</i>; or (d) a trust, if the proper law of the trust and the law of the trust's administration are the law of a Territory; or (e) an entity, the core or routine activities of which are carried out in or in connection with a Territory.
Registered charity	a 'registered entity' as defined in s 300-5 of the ACNC Act, ie an entity that is registered under the ACNC Act
Responsible person	<p>a 'responsible entity' as defined in s 205-30 of the ACNC Act:</p> <ul style="list-style-type: none"> (a) in the case of a registered entity that is a company – a director of the registered entity; (b) in the case of a registered entity that is a trust – each of the following: <ul style="list-style-type: none"> (i) the trustees of the registered entity; (ii) if a trustee of the registered entity is a body corporate – a director of the trustee; (c) a person who is any of the following: <ul style="list-style-type: none"> (i) a trustee in bankruptcy of the registered entity; (ii) a receiver, or receiver and manager, of the property of the registered entity; (iii) an administrator of the registered entity; (iv) an administrator of a deed of company arrangement executed by the registered entity; (v) a liquidator of the registered entity;

	(vi) a trustee or other entity administering a compromise or arrangement made between the registered entity and someone else.
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Abbreviation	Description
AASB	Australian Accounting Standards Board
ACCC	Australian Competition and Consumer Commission
ACIC	Australian Criminal Intelligence Commission
ACNC	Australian Charities and Not-for-profits Commission
ACNC Commissioner or Commissioner	Commissioner of the ACNC
ACNC (C&T) Act	<i>Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth)</i>
ACNC Regulation	<i>Australian Charities and Not-for-profits Commission Regulation 2013 (Cth)</i>
ACNC Act or Act	<i>Australian Charities and Not-for-profits Commission Act 2012 (Cth)</i>
AFP	Australian Federal Police
AFR	Australian Financial Report
AIS	Australian Information Statement
ASIC	Australian Securities and Investment Commission
ATO	Australian Taxation Office
APRA	Australian Prudential Regulation Authority
AUSTRAC	Australian Transactional Reports and Analysis Centre
BRC	Basic religious charity as defined in s 205-35 of the ACNC Act
Charities Act	<i>Charities Act 2013 (Cth)</i>
Australian Constitution	<i>Constitution of the Commonwealth of Australia</i>
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
DOB	Date of birth
Revised Explanatory Memorandum	Australian Charities and Not-for-profits Commission Bill 2012 Revised Explanatory Memorandum
FOI Act	<i>Freedom of Information Act 1982 (Cth)</i>
ORIC	Officer of the Registration of Indigenous Corporations
Privacy Act	<i>Privacy Act 1988 (Cth)</i>

1. Introduction

- 1.1 This section provides background information, including a snapshot of the charity sector, a brief history of the establishment of the ACNC, and an overview of the key features of the ACNC legislation and of the ACNC's approach to administering the legislation.

The charity sector

- 1.2 Charities make an invaluable contribution to our community, providing vital services, engaging volunteer effort and helping beneficiaries all over Australia and internationally as well. Over half of registered charities operate in the religious, education and research or social services sector. Many are located in the major cities, but charities also have significant presence in local communities in regional and remote areas of Australia.
- 1.3 The charity sector relies heavily on volunteer support, with 2.9 million Australians volunteering and almost 1.3 million Australians employed by charities.¹
- 1.4 In terms of the sector's economic impact, the total economic contribution of the sector in 2014-15 was equivalent to 8.5% of Australia's GDP and 16.6% of total Australian employment.² The revenue of Australia's registered charities in 2016 of \$142.8 billion.³
- 1.5 The economic scale of charities varies greatly, with the largest 10% of charities receiving 90% of the sector's income, while over one third are considered 'extra small' with revenue below \$50,000 per year.

The history of the ACNC

- 1.6 Historically, regulation of the charity sector and the broader not-for-profit sector in Australia has been disjointed and inconsistent. Not-for-profit entities, including charities, seeking access to tax concessions and exemptions have been subject to a degree of oversight by the ATO and by State and Territory revenue offices. In addition, ASIC has regulated not-for-profit and charitable companies, while incorporated associations have been regulated by the relevant state or territory regulator.
- 1.7 The regulatory frameworks at both the Commonwealth, state and territory levels have imposed their own, often duplicative, reporting requirements.
- 1.8 Six national inquiries on regulation of the not-for-profit sector were conducted from 1995.⁴ Each of these inquiries found that it was necessary to simplify and

¹ A Powell et al, *Australian Charities Report 2016*, Centre for Social Impact and Social Policy Research Centre, UNSW Australia (2017).

² Deloitte Access Economics, *Economic contribution of the Australian charity sector July 2017* [3.4].

³ Above n 1.

⁴ Industry Commission, *Charitable Organisations in Australia* (1995); Department of Treasury (Cth), *Report of the Inquiry into the Definition of Charities and Related Organisations*; Standing Committee on Economics, Parliament of Australia (2008) *Disclosure regimes for charities and not-for-profit organisations* (2001); Productivity Commission, *Contribution of the Not-for-Profit Sector* (2010); Department of Treasury (Cth), *Australia's Future Tax System: final report* (2010); Senate Economic Legislation Committee, Parliament of Australia, *Tax Laws Amendment (Public Benefit Test) Bill 2010* (2010).

harmonise regulation for the not-for-profit sector, and recommended some form of independent regulator as a solution.

- 1.9 The Productivity Commission's review in 2010 recommended the establishment of a national one-stop-shop regulatory framework to oversee the not-for-profit sector and grant tax endorsements and the pursuit of greater harmonisation of regulation between the states and territories and the Commonwealth to reduce compliance costs.
- 1.10 In 2011, the Gillard Government committed to implementing the Productivity Commission's recommendations. As part of this commitment, Treasury released a public consultation paper for a Scoping Study for a National Not-for-Profit Regulator⁵ in early 2011.
- 1.11 Treasury's final report for the Scoping Study was released in July 2011. The key recommendation was to pursue a long-term objective for a single national regulator and harmonised regulation of the not-for-profit sector. An ACNC Implementation Taskforce, headed by Susan Pascoe AM, was established.
- 1.12 Following extensive consultation with the charity and not-for-profit sector, the government, and broader community groups, the ACNC Implementation Taskforce released the Implementation Report in June 2012.⁶ The report proposed an implementation plan for the ACNC based upon the feedback received from key stakeholder groups, as well as research into regulatory models and approaches.
- 1.13 The ACNC Bill passed the Senate on 1 November 2012 and received royal assent on 3 December 2012. Susan Pascoe AM was appointed as the inaugural ACNC Commissioner.
- 1.14 The Coalition Government introduced a bill to repeal the ACNC Act in early 2014. However, the repeal legislation was not enacted. In March 2016, the Assistant Treasurer and Minister for Small Business, the Hon. Kelly O'Dwyer MP and the Minister for Social Services, the Hon. Christian Porter MP, announced that the Government had decided to retain the ACNC.

ACNC legislation

ACNC Act

- 1.15 The ACNC Act established a new regulatory framework for the not-for-profit sector, with the ACNC as the responsible regulator.
- 1.16 The three objects of the Act are:
 - (a) To maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector;
 - (b) To support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
 - (c) To promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.
- 1.17 In the exposure draft of the Australian Charities and Not-for-profits Commission Bill, only the first object was included. The second and third objects were subsequently

⁵ Department of Treasury (Cth), *Scoping study for a national not-for-profit regulator – consultation paper* ((2011).

⁶ ACNC Implementation Taskforce, *Implementation Report* (2012).

added in response to representations from the key stakeholders in the charity sector.

- 1.18 The key features of the regulatory framework are registration of not-for-profit entities that meet the description of specified types of entity, a publicly available register, the creation of minimum governance standards and external conduct standards,⁷ reporting obligations and the Commissioner's information gathering, monitoring and investigation powers.

ACNC (C&T) Act

- 1.19 The ACNC (C&T) Act sets out transitional arrangements for charities coming within the ACNC's regulatory remit and makes consequential amendments to related Commonwealth legislation. These include amendments to the Corporations Act 2001 to reduce regulatory duplication for charitable companies and other charitable bodies corporate registered with the ACNC.

ACNC Regulation

- 1.20 The ACNC Regulation sets out:
- (a) additional information that must be included on the ACNC Register and information that must be withheld from the ACNC Register;
 - (b) the ACNC governance standards;
 - (c) transitional reporting arrangements; and
 - (d) additional requirements for entities filing annual financial reports.

Constitutional basis for the ACNC legislation

- 1.21 It is relevant to note here the constitutional basis for the ACNC Act and how this has affected the legislative scheme.
- 1.22 Under the Australian Constitution, the Commonwealth does not have any legislative power specifically to regulate the not-for-profit sector. Consequently, different Commonwealth legislative powers support particular parts of the ACNC Act. The key powers relied on and the parts of the Act each power supports are summarised below:

Key legislative powers

Taxation power

- 1.23 The taxation power⁸ allows the Commonwealth to make laws with respect to taxation. The taxation power supports the provisions of the ACNC Act that establish a registration scheme as a prerequisite for NFPs to access certain Commonwealth tax concessions (Part 2-1) and empower the Governor-General to make regulations prescribing governance standards that entities must meet as a prerequisite to being registered and remaining entitled to be registered (Part 3-1).

⁷ External conduct standards have yet to be specified.

⁸ Australian Constitution s 51(v).

Corporations power and Territories power

- 1.24 The corporations power⁹ allows the Commonwealth to make laws with respect to certain types of corporations.
- 1.25 The Territories power¹⁰ allows the Commonwealth to make laws for the government of any Territory.
- 1.26 Certain parts of the Act only apply in relation to ‘federally regulated entities’ (FREs). These are entities that the Commonwealth has the power to regulate under the corporation’s power or the Territories power.
- 1.27 Where a registered entity is a FRE, the corporations power or the Territories power supports the provisions of the ACNC Act that empower the Commissioner to exercise the following enforcement powers with respect to the entity:
- (a) Giving warnings and directions (Divisions 80 and 85);
 - (b) Accepting and seeking Court enforcement of certain undertakings (Division 90);
 - (c) Seeking, and a Court granting, injunctions (Division 95); and
 - (d) Suspending and removing a responsible person of the entity and appointing acting responsible persons (Division 100).

External affairs power

- 1.28 The external affairs power¹¹ allows the Commonwealth to make laws with respect to external affairs. ‘External affairs’ in this context includes persons, places, matters or things outside the geographical limits of Australia.
- 1.29 The external affairs power supports the provisions of the ACNC Act that empower the Governor-General to make regulations specifying ‘external conduct standards’.
- 1.30 In addition, the external affairs power supports the provisions that empower the ACNC Commissioner to exercise the enforcement powers referred to in Part 4-2 of the ACNC Act in relation to a registered entity in certain circumstances involving the external conduct standards.

Communications power

- 1.31 The communications power¹² allows the Commonwealth to make laws with respect to ‘postal, telegraphic, telephonic, and other like services’, including electronic communications.
- 1.32 The communications power supports the provisions of the ACNC Act that require the ACNC Commissioner to maintain the ACNC Register in the form of an electronic database that must be available for public inspection on the internet. The communications power also supports the provisions that empower:
- (a) the ACNC Commissioner to obtain information for the purpose of determining whether information provided to the Commissioner by a registered entity and included on the Register in accordance with Division 40, is correct (Division 70); and

⁹ Ibid s 51(xx).

¹⁰ Ibid s 122.

¹¹ Ibid s 51(xxix).

¹² Ibid s 51(v).

- (b) ACNC officers to monitor whether such information is correct (Division 75).

Support for record keeping and reporting obligations and information gathering and monitoring powers

- 1.33 Each of the taxation, corporations, Territories and external affairs powers also supports the provisions that set out:
 - (a) the recording keeping and reporting obligations of registered entities, to the extent that these are imposed in order to enable the assessment of a registered entity's compliance with the parts of the Act supported by the relevant power; and
 - (b) the Commissioner's information gathering powers and ACNC officers' monitoring powers, where those powers are used for the purpose of determining whether a registered entity has complied with provisions of the Act supported by the relevant power.

Constitutionally-based limitations

- 1.34 For the reasons set out above, the Commissioner's enforcement powers in Part 4-2 can only be used to address breaches of the Act or non-compliance with the governance standards by 'federally regulated entities' or non-compliance with the external conduct standards. It should be noted also that no external conduct standards have been specified as yet.
- 1.35 As a consequence, the ACNC has limited options to address compliance concerns in relation to registered charities that are not FREs. In accordance with the ACNC's regulatory approach (discussed further below), the ACNC seeks to engage with registered charities about compliance concerns and to resolve issues by means such as providing regulatory guidance and negotiating compliance agreements. However, where these approaches are unsuccessful, the use of the graduated enforcement powers in Part 4-2 of the ACNC Act is not available to the ACNC if the charity is not a FRE. In such cases, the ACNC's only option is to revoke the charity's registration (where the grounds for doing so exist), and to refer matters of concern to other regulators where they have jurisdiction.
- 1.36 The constitutional basis for the Act also limits the extent to which the ACNC can regulate responsible persons of charities or other individuals associated with charities. This is because, as outlined above, the registration scheme under Part 2-1 of the Act is supported by the taxation power. Obligations imposed on charities as a condition of entitlement to registration are supported by the taxation power because an entity must be registered to be able to access Commonwealth charity tax exemptions and concessions. However, the Commonwealth does not have a broad power to impose obligations on a charity's responsible persons or staff.
- 1.37 Consequently, the only powers under the ACNC Act that are directed to responsible persons are the powers to suspend or remove a responsible person under Division 100, and the power to disqualify a person from being a responsible person under governance standard 4 (s 45.20 of the ACNC Regulation). As outlined above, the provisions setting out the suspension and removal powers are supported by corporations power, the Territories power and the external affairs power, rather than the taxation power. The Commissioner may only disqualify a person from being a responsible person if that person has previously been suspended or removed.
- 1.38 The constitutional limits on the power to regulate responsible persons is also evident in governance standards 4 and 5. These standards impose obligations *on a*

registered charity to take reasonable steps to ensure that its responsible persons are suitable and are subject to and comply with certain duties, rather than imposing obligations on responsible persons directly. The imposition of obligations on charities with respect to their responsible persons has created additional complexity and some uncertainty with respect to the status and obligations of responsible persons under the regulatory framework established by the ACNC Act.

- 1.39 As these restrictions are a consequence of the constitutional basis of the ACNC Act, proposed legislative changes to address them are likely to be beyond the legislative power of the Commonwealth parliament. As such, they are noted here, but are not the subject of recommendations in this submission.
- 1.40 The ACNC notes that there is currently no provision at the Commonwealth level for protecting the charitable assets of a deregistered charity. This responsibility is within the jurisdiction of State and Territory Attorneys-General in their capacity as guardian of the public interest in the enforcement of charities.¹³
- 1.41 In some jurisdictions with charity registration systems, deregistered charities are required to wind up within a specified time period and distribute their surplus assets to a similar charity or pay a 'revocation' tax.¹⁴

Recommendation 1

Consider whether measures could be introduced at the Commonwealth level to protect a charity's accumulated charitable income and assets after its ACNC registration has been revoked.

¹³ GE Dal Pont *Law of Charity* (2010) [14-23]-[14.26].

¹⁴ In Canada a 'revocation tax' is payable by a revoked charity 12 months after the revocation date. The tax is equal to 100% of all remaining assets after payment of debts. During the 12 month period charities may apply their charitable assets to their charitable purposes or transfer them to an eligible donee. In New Zealand a deregistered charity has 12 months from the date of deregistration to distribute its accumulated income and assets for charitable purposes or in accordance with its governing rules. Net assets (with some exceptions) and income retained at the end of this period are taxed as income.

Regulatory framework

Registration

- 1.42 The ACNC's primary function under the ACNC Act is to register not-for-profit entities. Entities are entitled to be registered if they meet the eligibility conditions set out in the Act.
- 1.43 Currently, charities are the only type of not-for-profit entity eligible for registration with the ACNC. This reflects government's decision to limit the ACNC's jurisdiction initially to charities, with the ability to include other not-for-profit entities in the future.¹⁵ Consequently, while the ACNC's name accurately reflects the *potential* scope of the regulatory framework established by the ACNC Act, it does not reflect its current *actual* scope.
- 1.44 It is difficult to accurately estimate the number of not-for-profit entities in Australia. However the ACNC-AUSTRAC risk assessment of Australia's not-for-profit sector identified approximately 257,000 not-for-profit entities operating in Australia, not including unincorporated associations that are not registered with the ATO or the ACNC.¹⁶ There are approximately 190,000 not-for-profit entities endorsed by the ATO for tax concessions, of which approximately 54,000 are registered charities.¹⁷ The ACNC estimates that there are approximately 7,500 companies limited by guarantee and 131,000 incorporated associations that are 'non-charitable' not-for-profits. The ACNC's jurisdiction could be extended to some classes of these entity types.
- 1.45 Should government decide, following this review, that the regulatory framework not be extended to other not-for-profit entity types, it is the ACNC's view that the name of the regulator should be changed to reflect that it regulates the charity sector rather than the broader not-for-profit sector.
- 1.46 Registering with the ACNC is not compulsory, but charities must be registered to access Commonwealth charity taxation concessions and some exemptions, as discussed above at paragraph 1.23. Once registered, charities receive the benefits of registration, but also take on the obligations under the Act that apply to registered charities.

ACNC Register

- 1.47 The Act requires the Commissioner to maintain an electronic register of charities that is made available on the internet (Register).
- 1.48 Information that must be displayed on the Register about each registered charity includes:
- (a) name, contact and identifying details (such as ABN);
 - (b) registration type and subtype;

¹⁵ Revised Explanatory Memorandum, [3.23].

¹⁶ AUSTRAC and ACNC, *Australia's non-profit organisation sector: money: laundering and terrorism financing risk assessment* (2017) 19. There are no reliable estimates of the number of unregistered unincorporated associations operating in Australia.

¹⁷ *Ibid* 28.

- (c) governing rules;
 - (d) current responsible persons;
 - (e) annual financial reports and information statements; and
 - (f) enforcement outcomes.
- 1.49 Information about formerly registered charities must also be displayed, but this is limited by s 40-5(1)(b) to the charity's name, ABN, registration type and subtype, registration date and governing rules.
- 1.50 At the commencement of the Act, 56,000 charities were transferred to the ACNC register from the ATO. The Register currently lists approximately 55,000 charities. This number has not fluctuated dramatically from year to year, with the number of new charity registrations being offset by charities that are removed from the register after being revoked or seeking voluntary revocation.
- 1.51 The purpose of the Register is to encourage greater levels of transparency, accountability and governance, and to empower the public to make informed choices, promote philanthropy and enhance public confidence.

Obligations of registered charities

- 1.52 To maintain their entitlement to registration, registered charities have ongoing obligations under the ACNC Act. They must submit annual reports and notify the ACNC of changes to their details.
- 1.53 To be eligible for registration and to maintain eligibility, charities must also be able to demonstrate that they meet the five ACNC governance standards,
- 1.54 The ACNC has a range of investigatory powers. If a registered charity contravenes the Act or fails to comply with the governance standards, the Commissioner may revoke its registration. In addition, penalties may be imposed for some contraventions. There is also a range of enforcement powers that can be used to address non-compliance by registered charities that are 'federally regulated entities'.

ACNC's regulatory scope

- 1.55 The ACNC does not have complete and uniform oversight of charities in Australia. As noted above, registration with the ACNC is not compulsory and an unknown number of charities choose not to register. Further, basic religious charities are exempt from complying with the governance standards and from providing annual financial reports, regardless of the amount of their annual revenue.

Advisory Board

- 1.56 As well as establishing the ACNC, the Act establishes the ACNC Advisory Board. This body can provide the Commissioner with advice in the exercise of his or her duties. Board members are chosen by the Minister for their expertise in the not-for-profit sector, or in law, taxation or accounting.

Operationalising the ACNC Act

ACNC's regulatory approach

- 1.57 The ACNC aims to be a regulator that is equipped to meet the unique needs of a diverse charity sector.

- 1.58 The ACNC Regulatory Approach Statement is set out on the ACNC website.¹⁸ The ACNC's regulatory approach is informed by the ACNC's five key values of **F**airness, **A**ccountability, **I**ndependence, **I**ntegrity and **R**espect (**FAIR**) and the regulatory principles of regulatory necessity, reflecting risk and proportionate regulation. The approach is summarised by the regulatory pyramid reproduced at appendix 1. The Statement is reviewed periodically with consultation from the sector, and was last updated in 2015.

Education and guidance

- 1.59 The ACNC Commissioner has an express function to assist registered charities in complying with and understanding the Act, providing them with education and guidance.¹⁹ The ACNC fulfils this function in various ways.
- 1.60 Educational material on ACNC-specific obligations is available on the ACNC website. In addition, the ACNC regularly produces webinars, podcasts, newsletters and hosts events to educate the charity sector. Some of these educational activities are conducted jointly with other bodies, for example the ACNC and CPA Australia have jointly produced podcasts relevant to finance, accounting and business professionals in the sector. In addition, the ACNC engages with financial, accounting and legal professionals who support the sector, including through their professional bodies.
- 1.61 Another example of ACNC's educational program is the 'Ask ACNC' events which were held in 26 locations across Australia in 2016. 'Ask ACNC' sessions are freely available to charities and the public, and provided an avenue for charities to have their questions answered directly by ACNC staff and to receive basic training in financial reporting.
- 1.62 In addition to producing educational tools, the ACNC has established an advice service which is available to charities and the general public. Advice is primarily provided by telephone, but also by email, fax, mail and social media, to reflect the diverse needs of the sector. In the 2016-17 financial year, the ACNC's advice service answered around 35,000 phone calls and received over 21,000 emails, highlighting the considerable support provided to charities and the public through this service.

Engaging the sector

- 1.63 The ACNC consults regularly with sector representatives and their professional advisers through the Professional User Group (PUG) and the Sector User Group (SUG) in meetings three times per year and at other times by email.
- 1.64 The ACNC also participates in public events to increase the awareness of its work and to inform the sector of relevant issues.

Red-tape reduction

- 1.65 Red-tape reduction has been a significant focus for the ACNC. The ACNC's approach in this area has been two-fold: minimising its own regulatory requirements

¹⁸

http://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/RegApp_St2013/ACNC/Publications/Reg_App/RegApp_Powers.aspx?hkey=e8deb00c-f626-4813-8f50-1cf1ef8f0a6b.

¹⁹ ACNC Act s 110-10(1).

to only what is necessary, and working with other agencies to reduce unnecessary or duplicative administrative requirements.

- 1.66 The ACNC has taken steps to implement a 'report once, use often' framework by creating the Charity Passport to facilitate the sharing of charity information across government. As at 11 January 2018, there were 51 active users across 22 government agencies that access the Charity Passport for charity information.
- 1.67 To ease ongoing duplicative reporting, the ACNC has actively worked with the states and territories to streamline and harmonise reporting requirements. In 2016, South Australia and Tasmania introduced legislation to address this issue, with the ACT following in 2017. Discussions with other states and territories continue.

Compliance and enforcement

- 1.68 In 2017 the ACNC finalised 80 investigations. Twenty-six charities had their registration revoked following investigation. One charity entered into an enforceable undertaking, 16 charities entered into compliance agreements and 31 charities were provided with regulatory guidance. One hundred and fifteen charities were issued with penalty notices for failing to submit their AISs and 780 charities had their registration revoked for failing to submit their AISs for two reporting periods. Forty-nine notices were served to obtain information and documents.
- 1.69 With the greater amount of information available about charities, especially through the AIS, the ACNC continues, within its available resources, to increase its capacity to strategically analyse the sector and identify risks proactively. The ACNC has established partnerships with other government agencies, such as AUSTRAC and ATO, and law enforcement agencies, such as AFP and ACIC, to target key risks in the charity sector including money laundering and terrorism financing.

Looking to the future

- 1.70 In the next phase of its operation, the ACNC considers that there is scope to:
- (a) increase the transparency and accountability of charities by improving the useability of the Register and presenting information about registered charities in a more accessible way; and
 - (b) provide more guidance to charities on good governance and assist them to improve their governance overall, including processes and procedures.
- 1.71 As noted above, the second and third objects were added in response to consultation with charity sector leaders. However, since its inception, the ACNC has been funded only to undertake operations directed primarily to the first object.
- 1.72 The ACNC has pursued initiatives directed to education and guidance and red-tape reduction, within the limits of its current financial appropriation. The ability to continue these initiatives and also to increase the ACNC's focus on other priority areas will, of course, depend on the extent of its resources.

2. Objects of the ACNC Act

- 2.1 Section 15-5(1) of the ACNC Act sets out the following three objects:
- (a) To maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
 - (b) To support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
 - (c) To promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.
- 2.2 The Terms of Reference direct the Review Panel to examine the extent to which these objects continue to be relevant.
- 2.3 The objects have served as a touchstone for the ACNC in formulating its regulatory approach and determining its strategic and operational priorities. Overall, the ACNC considers that they continue to be relevant objects to be achieved by a regulatory regime for the not-for-profit sector in Australia.
- 2.4 The ACNC considers that there may be benefit in including the following additional objects:
- (a) To promote the effective use of the resources of not-for-profit entities; and
 - (b) To enhance the accountability of not-for-profit entities to donors, beneficiaries and the public.²⁰
- 2.5 In our view these are appropriate objectives for a charity regulator. In this connection we note that the Commissioner is required in performing his functions and exercising his powers to have regard to a number of matters including ‘the need for transparency and accountability of the not-for-profit sector to the public (including donors, members and volunteers of registered entities) by ensuring the public has access to information about not-for-profit entities and ‘the maintenance and promotion of the effectiveness and sustainability of the not-for-profit sector’.²¹
- 2.6 It should also be noted that the ACNC does not have specific powers or functions under the ACNC Act that relate directly to the achievement of the second or third objects. If additional objects were added to the ACNC Act, then consideration would need to be given to whether additional powers and functions would be needed (within constitutional constraints) - and additional resourcing - to enable them to be met.
- 2.7 As discussed in section 1 of this submission, the ACNC has pursued the third object by working with other Commonwealth, State and Territory departments and agencies to streamline reporting obligations where possible.
- 2.8 The second object is furthered by the existence of a regulatory regime specifically designed for the not-for-profit sector and a specialist regulator that assists its regulated population to improve governance and risk management. This object is also served by the ACNC’s ‘red-tape reduction’ initiatives described in section 1. The ACNC notes that its ability to pursue this object beyond these activities is limited due to lack of relevant functions and powers as well as resource constraints.

²⁰ See objectives 4 and 5 of the Charity Commission of England and Wales: *Charities Act 2011* (UK), s 14.

²¹ ACNC Act ss 15-10 (b),(d).

In addition, the ACNC is mindful of the need to ensure that any activities it undertakes in pursuit of the second object are not inconsistent with its role as a regulator.

Recommendation 2

Consider adding the following objects in s 15-5 of the ACNC Act:

- (a) To promote the effective use of the resources of not-for-profit entities; and
- (b) To enhance the accountability of not-for-profit entities to donors, beneficiaries and the public.

3. Definition of ‘not-for-profit’

3.1 To be a charity as defined in the *Charities Act 2013* (Cth) (Charities Act), an entity must be a not-for-profit entity.²²

3.2 One of the conditions of entitlement to registration under the ACNC Act for any entity type is that it is a ‘not-for-profit’ entity.²³

3.3 The term ‘not-for-profit’ is not defined in either the ACNC Act or the Charities Act.

3.4 The Revised Explanatory Memorandum to the ACNC Bill states:

A NFP entity is generally an entity that is not operating for the profit or gain of its individual members, whether the gains are direct or indirect. This applies both while the entity is operating and when the entity winds up.²⁴

3.5 The Explanatory Memorandum to the Charities Bill contemplated that the definition of ‘not-for-profit’ that was to be inserted in s 995-1 (1) of the *Income Tax Assessment Act 1997* (Cth) (ITAA) by the enactment of the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (*NFP Concessions Bill*) would apply to the Charities Act.²⁵

3.6 The definition in the *NFP Concessions Bill* (which was not enacted) was as follows:

not-for-profit entity means an entity that:

- (a) is not carried on for the profit or gain of its owners or members, neither while it is operating nor upon winding up; and
- (b) under an Australian law, foreign law, or the entity’s governing rules, is prohibited from distributing, and does not distribute, its profits or assets to its owners or members (whether in money, property or other benefits), neither while it is operating nor upon winding up, unless the distribution:
 - (i) is made to another not-for-profit entity with a similar purpose; or
 - (ii) is genuine compensation for services provided to, or reasonable expenses incurred on behalf of, the entity.²⁶

3.7 The ACNC currently considers whether applicants for registration are ‘not-for-profit’ entities within the ordinary meaning of that term. In the majority of cases, the absence of a statutory definition has not given rise to difficulties. However, questions are raised on occasion as to what requirements must be satisfied to demonstrate that an entity is of a ‘not-for-profit’ character, particularly in relation to restrictions on the distribution of assets on winding up. A statutory definition may

²² Charities Act s 5 (definition of charity, para (a)).

²³ ACNC Act s 25-5 (3)(a).

²⁴ Revised Explanatory Memorandum [3.33].

²⁵ Explanatory Memorandum, Charities Bill 2013 (Cth) and Charities (Consequential Amendments and Transitional Provisions) Bill 2013 (Cth) [1.22].

²⁶ *NFP Concessions Bill* cl 44.

reduce the uncertainty on this issue and, as a consequence, lead to increased efficiency in the registration process.

- 3.8 The ACNC notes that the wording of a statutory definition of ‘not-for-profit’ would require careful consideration. In particular, the definition should make clear that the provision of incidental private benefits to members of an organisation or to charitable beneficiaries does not preclude the organisation from being ‘not-for-profit’ or charitable under the general law or the Charities Act.

Recommendation 3

Consider whether a statutory definition of ‘not-for-profit’ should be introduced for the purposes of the ACNC Act and the Charities Act.

4. ACNC Register

The Register

- 4.1 Section 40-5 of the Act provides that the Commissioner is to maintain a register containing specified information about registered charities (Register).
- 4.2 The purpose of the Register is to provide a single source of easily accessible public information that increases transparency, enables not-for-profit entities to demonstrate accountability and governance, gives information to the public about charities and promotes public confidence, informed choices and philanthropy.²⁷
- 4.3 Section 40-5(1) of the ACNC Act specifies the information that must be included on the Register subject to the Commissioner's discretion under s 40-10 to withhold information in certain circumstances. Although not expressly stated in the ACNC Act, the ACNC considers that the proper construction of s 40-5 of the Act is that it exhaustively specifies the information that may be included on the Register.

Proposed changes

Additional items

- 4.4 The ACNC considers that the Register would be enhanced by the inclusion of additional information that is not currently specified in s 40-5(1).
- 4.5 Some of the additional items could be included in the table in s 40.1 of the ACNC Regulation, while others may be more appropriately specified in s 40-5(1) of the Act.
 - (a) **The date an AIS and AFR is lodged with the ACNC:** Including these dates on the Register would make it plain that a registered charity has or has not lodged its reports within the statutory timeframes.
 - (b) **That information has been withheld from the Register and an explanation of 'withheld':** Section 40-10 of the ACNC Act gives express power to the Commissioner to withhold information that would otherwise be displayed on the ACNC Register in certain circumstances. By including a statement on the Register page for a registered charity that particular information has been withheld, the Register would be more intelligible.
 - (c) **The names, appointment and cessation dates of responsible persons:** The Register displays the names only of current responsible persons. Registered charities have an obligation to notify the Commissioner if an entity has ceased to be, or has become, a responsible entity of the registered entity.²⁸ It is the ACNC's view that displaying the appointment and cessation dates of a charity's responsible person(s) would increase transparency and accountability to the public.
 - (d) **The backdating of a charity's registration:** Under s 30-30 of the ACNC Act, a charity's registration has effect from a date specified by the Commissioner. Registration may be backdated if an entity satisfies the ACNC that it has been entitled to registration for a period prior to its application for registration. Section 40-5(vi) provides that the date of effect of a charity's registration is to

²⁷ Revised Explanatory Memorandum [4.8].

²⁸ ACNC Act s65-5(1)(c).

be included in the ACNC Register, but not the date of the decision to register. Displaying the date of the decision to register would make it easier to identify when a charity's registration has been backdated. In addition, a note could be added to explain that no reports have been lodged for previous reporting periods because the charity's registration has been backdated.

- (e) **Retain information that was displayed on the ACNC Register about formerly registered charities:** The Act currently authorises the display of specific items of information about a former registered charity.²⁹ The ACNC considers that transparency would be improved by displaying additional items, including the names of responsible persons, AISs and AFRs.
- (f) **Ground(s) for revocation/summary of reasons for revocation:** The Commissioner may revoke the registration of a registered entity if the Commissioner reasonably believes that any of the conditions in paragraphs (a) to (e) of section 35-10(1) of the ACNC Act are met. The ACNC considers that displaying this information and a summary of the reasons for revocation on the Register would provide greater transparency and accountability. The rationale for this proposal is explained in detail in section 6 of this Submission.
- (g) **Legal structure, incorporated association number (for incorporated associations) and Australian Company Number (ACN) (for companies):** Displaying this information on the Register would provide a greater degree of transparency about other regulatory regimes that apply to a registered charity.
- (h) **Charitable purpose (mission statement):** Governance standard 1 requires that a registered entity make information about its purposes available to the public (section 45.5(2)(b) of the Regulations). Publishing a statement of a charity's charitable purpose(s) on the Register would be an appropriate way of complying with this requirement.
- (i) **A compliance agreement entered into by the charity:** Because the Commissioner may only exercise the enforcement powers in Part 4-2 of the ACNC Act with respect to federally regulated entities, ACNC compliance officers use a range of other compliance mechanisms, including entering into voluntary compliance agreements. Recording on the Register that a charity has entered into a compliance agreement would increase transparency.
- (j) **Deductible gift recipient status (DGR):** The display of this information on the Register would enable users to search for charities that have DGR status.

Recommendation 4

Amend s 40-5 of the ACNC Act and s 40.1 of the ACNC Regulation (as appropriate) to include the additional data items described in paragraph 4.5.

Information contained in the AIS and the AFR

- 4.6 Currently, the Commissioner is required to include the AISs submitted by a registered charity on the Register but is not authorised to extract information from the AIS and display it on the face of the register entry for a charity. The display of information from the AIS, such as the summary of a charity's activities and financial position, would make it more accessible to users.

²⁹ ACNC Act s 40-5 (b).

Use of alternative formats

- 4.7 The ACNC considers that some information could be more clearly conveyed using a variety of alternative formats. For example, financial information may be more accessible if displayed in a graphical format.

Recommendation 5

Amend s 40-5 of the ACNC Act to give the Commissioner a discretion to:

- (a) extract information from a registered charity's AIS and display it on the face of the Register entry for the charity; and
- (b) display information on the Register in text or in a graphical format.

Discretion to include information voluntarily provided by registered charities

- 4.8 As noted above, the ACNC considers that s 40-5 is an exhaustive list of the information that the Commissioner may display on the register.
- 4.9 Some charities may wish to provide additional information to the ACNC for the purpose of display on the Register that is not information the Commissioner is authorised to collect under the ACNC Act. There is currently no provision in the Act that authorises the Commissioner to collect such information.³⁰ Having the discretion to display such information where it would assist the public in understanding the structure, operations or impact of a charity, would, in the ACNC's view, increase the utility of the Register as a repository of public information about charities.
- 4.10 Examples of such information may include:
- (a) **A web link to other registers:** a link on the register page for incorporated charities to other registers would enable the user to verify that the charity is a company or an incorporated association, or to check if has a fundraising licence (as the case may be).
 - (b) **Membership of code bodies and accreditations:** The charity's affiliation with other groups and associations increases the charity's accessibility to other bodies and supports transparency within the sector.

³⁰ The definition of 'information subject to monitoring' for the purposes of the Act includes information given by an entity *voluntarily* that is included on the Register. None of the items of information described in ss 40-5(1)(a)-(e) of the ACNC Act is provided voluntarily by registered charities. The table in s 40.1 of the ACNC Regulation sets out 11 items of additional information that must be included on the Register if the conditions applying to that item are met. The condition that the information has been voluntarily disclosed to the Commissioner by the registered entity for the purpose of being included on the Register applies to 7 of these items. However, the regulation may only prescribe items for inclusion on the ACNC Register that the Commissioner is authorised to collect under a provision of the ACNC Act: s 40-5(1)(g).

Recommendation 6

Consider amending the ACNC Act to authorise the Commissioner to collect and display on the Register information provided voluntarily by a registered charity for that purpose where the information would assist the public to understand the structure, operations or impact of the registered charity.

5. Responsible persons

Introduction

- 5.1 A registered charity's responsible persons are individuals (and, in some cases, other entities) that are responsible for the decision-making, management and compliance of a registered charity.³¹
- 5.2 The current conditions for suitability of responsible persons are restricted to a narrow range of matters. The ACNC is of the view that additional suitability conditions for responsible persons are needed to meet the first object of the Act, "to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector".
- 5.3 The ACNC also considers that the Act should be amended to clarify the Commissioner's powers to collect information about responsible persons.

Background and current legislative powers relating to responsible persons

Definition and duties of the responsible person

- 5.4 Responsible persons include directors of companies, trustees of trusts (or where the trustee is a body corporate the directors of the trustee) and members of management committees.³²
- 5.5 There is no requirement under the ACNC Act for a registered charity to have a minimum number of responsible persons, or for any of the responsible persons to be resident in Australia.
- 5.6 Suitability conditions for responsible persons are set out in governance standard 4. It is the charity's duty to ensure that each of its responsible persons meets and continues to meet the suitability conditions. Responsible persons are not suitable if they are disqualified from managing a corporation under the Corporations Act or if they have been disqualified by the ACNC Commissioner at any time during the preceding 12 months from being eligible to be a responsible person of a registered charity.³³
- 5.7 Under the Corporations Act, a person is disqualified from managing a corporation if the person:

³¹ Revised Explanatory Memorandum [13.68].

³² Responsible persons are referred to as 'responsible entities' in the ACNC legislation. If a registered charity is a company its directors are its responsible persons. If a registered charity is a trust, its trustees, and, in the case of a corporate trustees, the directors of the corporate trustee, are its responsible persons: see ACNC Act s 205-30. A 'company' means a body corporate or any unincorporated association or body of persons, but does not include a partnership: ACNC Act s 205-10. A 'director' of a 'company' means, if the company is incorporated – a director of the company or an individual who performs the duties of a director; if the company is not incorporated, a member of the committee of management of the company, or an individual who performs the duties of such a member: ACNC Act s 300-5.

³³ Section 45.20(4) of the ACNC Regulation (governance standard 4) provides that the Commissioner may disqualify a person from being eligible to be a responsible person if the person has previously been suspended, or removed under Division 100 of the ACNC Act (see para 4.14) and the Commissioner reasonably believes that the disqualification is justified having regard to the objects of the Act.

- (a) has been convicted of certain offences, i.e. significant dishonesty offences, other offences that can affect a corporation and certain offences under the Corporations Act;
 - (b) is an undischarged bankrupt or is subject to a 'personal insolvency agreement' that the person has not complied with; or
 - (c) has been disqualified by the Australian Securities and Investments Commission (ASIC), the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORIC), or an Australian or New Zealand court.³⁴
- 5.8 Under governance standard 5, a registered charity is required to take reasonable steps to ensure that its responsible persons are subject to and comply with duties similar to the duties of directors under the Corporations Act.
- 5.9 The directors of registered charities that are unincorporated associations and the trustees of registered charitable trusts are subject to obligations and liabilities and are taken to have committed offences under the Act in certain situations.³⁵ Each director of a body corporate that is a registered charity may be liable to pay a penalty imposed on the registered charity under the Act if the amount is payable because of a deliberate act or omission of the director involving dishonesty, gross negligence or recklessness.³⁶

Collection of personal information about responsible persons

- 5.10 The name and position of each responsible person of a registered charity must be included on the ACNC Register.³⁷ Accordingly, an entity seeking registration is required to provide this information in its application and a registered charity must notify the Commissioner if a person ceases to be or becomes a responsible person.³⁸
- 5.11 The approved form for the AIS currently requires charities to provide the names and positions of persons who have become responsible persons during the reporting period.
- 5.12 The Act does not expressly require an applicant for registration or a registered charity to provide any other personal details of responsible persons or expressly authorise the Commissioner to collect such information.
- 5.13 Under s 205B of the Corporations Act, a company must lodge with ASIC a notice of the personal details of a director within 28 days after they are appointed. Personal details means:
- (a) their given and family names; and
 - (b) all of their former given and family names; and
 - (c) their date and place of birth; and
 - (d) their address.
- 5.14 This notification requirement is turned off for companies that are registered charities.

³⁴ Corporations Act s 206B.

³⁵ ACNC Act ss 180-5-180-25.

³⁶ Ibid s 180-30.

³⁷ Ibid s 40-5(1)(c).

³⁸ Ibid s 65-5(1)(c).

Suspension and removal of responsible persons

- 5.15 The Commissioner may suspend or remove a responsible person of a registered entity that is a 'federally regulated entity' if the suspension or removal is necessary to address a contravention of the Act or non-compliance with the governance standards. The Commissioner may also suspend or remove a responsible person if the suspension or removal is necessary to address non-compliance with the external conduct standards. In making the decision to suspend or remove a responsible person, the Commissioner must consider the matters set out in s 35-10(2) of the Act.

Disqualification

- 5.16 The Commissioner may disqualify a person from being a responsible person if they have previously been removed or suspended by the Commissioner and the Commissioner reasonably believes that the disqualification is justified having regard to the objects of the Act. Disqualification lasts for no longer than 12 months.
- 5.17 The Commissioner's power to suspend or remove a responsible person is enlivened if the Commissioner considers its exercise necessary to address a contravention of the Act or non-compliance with the governance standards by the charity. A failure by the charity to ensure its responsible persons meet the suitability conditions in governance standard 4 could provide the basis for suspension or removal of a responsible person.

Revocation of charity registration

- 5.18 The Commissioner may revoke the registration of a charity on a number of grounds, including that it is not or was not entitled to registration; has contravened or is more likely than not to contravene a provision of the Act or a governance standard provided information in connection with an application for registration that is false or misleading in a material particular.

Proposed changes

Minimum number of responsible persons and residency requirement

- 5.19 As noted above, the ACNC Act does not require that a registered charity have a minimum number of responsible persons or that any of the responsible persons be Australian residents.
- 5.20 Registered charities that are companies limited by guarantee (and, as such, are public companies) are required under the Corporations Act to have at least three directors, two of whom must ordinarily reside in Australia.³⁹

³⁹ Corporations Act s201A(2).

- 5.21 The ACNC considers that such requirements are generally conducive to good governance and therefore suggests that the Review Panel consider whether they should be introduced for registered charities, other than trusts and BRCs.

Recommendation 7

Consider whether the ACNC Act should be amended to require that registered charities, other than trusts and BRCs, to have a minimum number of three responsible persons, and at least two responsible persons who ordinarily reside in Australia, with the Commissioner having the power to exempt entities should there be special circumstances where different governance arrangements are appropriate.

Collection of personal information about responsible persons

- 5.22 The ACNC considers that the collection of identifying information about responsible persons (for example DOB, address and former names) is necessary to enable the Commissioner to perform or exercise certain of his or her functions or powers under the Act.
- 5.23 A current address for a responsible person is necessary:
- (a) to notify a responsible person of the Commissioner's decision to suspend or remove that person under s 100-10(3) or s 100-15(2); and
 - (b) to serve a penalty notice on a responsible person under s 175-50.
- 5.24 For the purposes of compliance activities and the administration of the provisions of Part 7-4 (under which responsible persons may be liable for certain payments or deemed to have committed certain offences), it is necessary for the ACNC to be able to identify the responsible person of the relevant registered charity with reasonable certainty. Identifying information in addition to the name of a responsible person is required for this purpose.
- 5.25 Information about a responsible person's history (including involvement in unlawful activities) and activities may in some cases be relevant in determining if an entity applying for registration is entitled to be registered or to conducting a compliance investigation into a registered charity.
- 5.26 Identifying information about a responsible person is 'personal information' as defined in the *Privacy Act 1988* (Cth) (Privacy Act). The ACNC is an 'agency' within the meaning of the Privacy Act and, as such, must comply with the Australian Privacy Principles ('APPs'). Under APP 3 an agency:
- (a) must not collect personal information about an individual (other than sensitive information) unless the information is reasonably necessary for, or directly related to, one or more of the agency's functions or activities;⁴⁰ and
 - (b) must not collect sensitive information about an individual unless:
 - (i) the individual consents to the collection of the information and the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities; or

⁴⁰ APP 3.1.

(ii) one of the specified exemptions applies.⁴¹

5.27 Sensitive information includes information or an opinion about an individual's criminal record.

5.28 Furthermore, an agency must collect personal information about an individual only from the individual unless:

- (a) the individual consents to the collection of the information from someone other than the individual or the entity is required or authorised by or under an Australian law, or a court/tribunal order, to collect the information from someone other than the individual; or
- (b) it is unreasonable or impracticable to do so.⁴²

As the ACNC Act currently stands, there is uncertainty as to whether, from whom and under what conditions, the ACNC is permitted under APP 3 to collect identifying details and other information about responsible persons.

Recommendation 8

Amend the ACNC Act to expressly authorise the Commissioner to collect:

- (a) the personal details (as defined in the Corporations Act) of responsible persons at the point of registration and to require registered charities to provide the personal details of a person who becomes a responsible person after registration; and
- (b) information about the involvement of a responsible person in unlawful activity (including that a responsible person has been convicted of a criminal offence) from a person other than the responsible person where the collection of the information is reasonably necessary for the purposes of determining whether an entity is entitled to be registered as a charity or for the purposes of determining whether a registered charity has contravened the Act or failed to comply with the governance standards or the external conduct standards.

Suitability conditions

5.29 The ACNC considers that additional suitability criteria for responsible persons are appropriate having regard to the risks to which charities and their beneficiaries may be exposed and the object of maintaining, protecting and enhancing public trust and confidence in the Australian not-for-profit sector.

5.30 Under the current provisions, individuals who have committed serious criminal offences that raise concerns about their fitness to be a responsible person, may nevertheless meet the suitability conditions in governance standard 4.

5.31 This poses risks for the charity, its beneficiaries and for the reputation of the sector as a whole. The risk is heightened for charities with vulnerable beneficiaries.

⁴¹ APP 3.3-3.4.

⁴² APP 3.6.

Proposed disqualifying offences

- 5.32 The ACNC proposes that s 45.20(3) of the ACNC Regulation be amended to provide that a person is disqualified from being a responsible person of a registered charity if they have been convicted of:
- (a) a terrorism, terrorism financing or money laundering offence under Commonwealth, State or Territory law;⁴³ or
 - (b) a relevant offence
- 5.33 The inclusion of terrorism, terrorism financing and money laundering offences as disqualifying offences aims to address the specific risks of terrorism financing and money laundering in the charity sector.⁴⁴
- 5.34 A relevant offence would be defined as an offence which is relevant to the operation of the charity. For example, a potential responsible person who has previously been convicted of animal cruelty would present a risk to an animal welfare charity but not to a charity with the purpose of promoting choral music.
- 5.35 It is suggested that the period during which a conviction for one of these offences would disqualify a person from being a responsible person be the same as for a disqualifying offence under the Corporations Act. In short, the disqualifying effect lasts until:
- (a) if the person does not serve a term of imprisonment--5 years after the day on which they are convicted.
 - (b) if the person serves a term of imprisonment--5 years after the day on which they are released from prison.
- 5.36 ACNC envisages that the Commissioner's ability to over-ride automatic disqualification in sub-section 45.20(5) of the ACNC Regulation would apply with respect to these additional offences. This is particularly important in the case of relevant offences to allow for those cases in which a person with a relevant offence may have a valuable contribution to make as a responsible person for a particular charity – people with similar life experiences may provide important insights into the most effective methods of assisting certain beneficiaries. This could be the case for example, where a person who has served a custodial or community-based sentence for an offence may make a valuable contribution on the board of a charity that provides behaviour change programs to offenders.
- 5.37 We note that the suitability criteria for charity trustees have recently been made more stringent in Canada and the United Kingdom. The changes we propose are consistent with the reforms in those jurisdictions.

⁴³ Under the Commonwealth, the specific offences fall under a number of divisions in the *Criminal Code Act 1995* – Schedule The Criminal Code. These divisions relate to terrorism (and include but may not be limited to Division 101, 102, 103 and 119) and money laundering (which includes but may not be limited to Division 400).

⁴⁴ The Financial Action Task Force (FATF) released its mutual evaluation report of Australia in April 2015. This report found Australia to be non-compliant with Recommendation 8 which relates to reducing the risk of terrorism financing through charities and not for profits. As a result of the FATF evaluation report, AUSTRAC and ACNC undertook a risk assessment of the not-for-profit sector. This identified that the sector has a medium risk for both money laundering and terrorism funding. The inclusion of these additional disqualifying offences for responsible persons will assist charities in addressing risks associated with these offences. (The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the ministers of its member jurisdictions specifically to combat money laundering and the financing of terrorism and proliferation at the international level. Australia is a founding member of the FATF.

Regulatory burden on the sector

- 5.38 The ACNC considers that any additional regulatory burden that these changes may impose on charities is proportionate having regard to the risk to public trust and confidence in the sector posed by the appointment of unsuitable individuals as responsible persons.
- 5.39 Governance standard 4 does not prescribe the steps a charity must take to meet the standard. This would also be the case with respect to the proposed additional suitability conditions.
- 5.40 The ACNC Commissioner would publish guidance material to assist registered charities in complying with the additional suitability conditions.

Recommendation 9

Amend s 45.20(3) of the ACNC Regulation to include the following suitability conditions to be a responsible person:

- (a) that the person does not have a 'disqualifying conviction' for a terrorism, terrorism financing or money laundering offence under Commonwealth, State or Territory law;
- (b) that the person does not have a 'disqualifying conviction' for a 'relevant offence', being an offence that is relevant to the operation of the charity.

6. Secrecy provisions

Introduction

- 6.1 The secrecy regime in Division 150 of the ACNC Act is intended to balance the need to protect personal and confidential information that entities provide to the ACNC with the need to enable disclosure of that information where it is necessary to disclose that information in accordance with the objects of this Bill.⁴⁵
- 6.2 However, the ACNC considers that the current secrecy provisions are overly restrictive and that it is unclear to what extent ACNC officers are permitted to publish information on investigations and regulatory outcomes. There is also uncertainty as to what disclosures of protected ACNC information may be made to other government agencies.

Background

Current secrecy provisions

- 6.3 The secrecy provisions in the Act apply with respect to 'protected ACNC information', that is, information that:
- (a) was disclosed or obtained under or for the purposes of the ACNC Act; and
 - (b) relates to the affairs of an entity; and
 - (c) identifies or is reasonably capable of being used to identify, the entity.⁴⁶
- 6.4 It is an offence under s 150-25 for an ACNC officer⁴⁷ to use protected ACNC information or disclose protected ACNC information other than to the entity to whom the information relates or their agent, or, where the entity is a registered charity, one of the charity's responsible persons. The penalties that may be imposed for this offence are significant.
- 6.5 There are a number of exceptions to the general prohibition in s 150-25, including:
- (a) disclosure or use of protected ACNC information by an ACNC officer in the performance of his or her duties under the ACNC Act;⁴⁸
 - (b) disclosure of protected ACNC information for the purposes of including the information on the ACNC Register and, if it is personal information, that the disclosure is necessary to achieve the objects of the Act;⁴⁹

⁴⁵ Revised Explanatory Memorandum [11.2].

⁴⁶ ACNC Act s 150-15. 'Entity' is defined in s 205-5 to mean any of the following: an individual, a body corporate; a body politic; any other incorporated association or body of persons; and a trust.

⁴⁷ For the purposes of the secrecy regime, an ACNC officer includes entities and individual contracted by the ACNC, Commonwealth employees and contractors performing functions or exercising powers under the ACNC Act, and members of the Advisory Board: ACNC Act s 150-10.

⁴⁸ ACNC Act s 150-30.

⁴⁹ Ibid s 150-35.

- (c) disclosure of protected ACNC information to an Australian government agency where certain conditions are met;⁵⁰
- (d) disclosure or use of ACNC protected information for a purpose with the consent of the entity to which the information relates to disclose or use the information for that purpose; and⁵¹
- (e) disclosure of protected ACNC information that has already been lawfully available to the public and is for the purposes of the Act.⁵²

Effect of secrecy provisions

- 6.6 The secrecy regime in its current form prevents the ACNC from:
- (a) publishing the reasons for its registration decisions;
 - (b) Making any public comments about a compliance investigation or compliance activity with respect to a particular charity except to the extent necessary to properly respond to or clarify issues that have been raised in the public domain by the charity; or
 - (c) publishing the grounds under the Act for revocation or the reasons for the decision to revoke the registration of a particular charity.
- 6.7 The ACNC considers that these restrictions impair its ability to operate as an effective regulator.

Proposed changes

Publishing reasons for registration decisions

- 6.8 The Charities Act sets out the definition of charity in Commonwealth law. The Commissioner or the Commissioner's delegate must apply that definition of charity to determine if an entity is entitled to be registered. Some applications raise novel questions and the Commissioner's decision in such a case may therefore be of broader public interest or have precedential value. However, the secrecy provisions do not allow publication of the ACNC's reasons for decision on registration applications.

Recommendation 10

Amend the ACNC Act to give the Commissioner a discretion to publish the reasons for decision on an application for registration where the Commissioner considers that it would be in the public interest to do so.

Publishing information on compliance activity

Revocation

- 6.9 The ACNC publishes the fact that a charity's registration has been revoked. Due to the restrictions imposed by the secrecy provisions, the ACNC does not publish the

⁵⁰ Ibid s 150-40. An Australian government agency is defined to mean (a) the Commonwealth, a State or a Territory; or (b) an authority of the Commonwealth or of a State or a Territory: s 300-5.

⁵¹ Ibid s 150-45.

⁵² Ibid s 150-50.

grounds for the revocation under the Act or the reasons for the revocation. The ACNC considers that the benefits of publishing this information would be twofold: it would promote public confidence in the ACNC's decisions and would also promote compliance by illustrating the standards of conduct required of registered charities and the consequences of failing to meet those standards.

Recommendation 11

Amend s 40-5 of the ACNC Act to provide that the ACNC Register is to include the grounds under s 35-10(1) on which a decision to revoke a charity is based, and a summary of the reasons for revocation.

Compliance activity

- 6.10 The ACNC is required to display on the Register the details of each exercise of the Commissioner's enforcement powers under Part 4-2.⁵³ This ensures that information about compliance action taken by the ACNC involving the use of these powers is available to the public. However, the enforcement powers under Part 4-2 may only be exercised against federally regulated entities. If a charity under investigation is not a federally regulated entity, ACNC compliance officers may use other compliance approaches to address issues of concern, such as providing regulatory guidance or negotiating a compliance agreement.
- 6.11 Currently, the secrecy provisions impose significant constraints on the ACNC's ability to inform the public about the use of these approaches in particular cases. The absence of any comment from the ACNC in cases that are the subject of media interest may lead the public to conclude that the ACNC is not taking the action that would be expected of an effective charity regulator. This, in turn, may have an adverse effect on public trust and confidence that the sector is effectively regulated.
- 6.12 The ACNC is mindful that public comments about an investigation should only be made when there is a clear public benefit that outweighs potential prejudice to entities and individuals who are, or who are likely to be, the subject of an investigation. There are a range of other factors that must also be taken into account in determining whether to make a statement in a particular case, including whether a statement might jeopardise an investigation through the untimely release of information and the risk of defamation and other legal proceedings.
- 6.13 Other Commonwealth regulators have more flexibility to make public comments on regulatory activities and regulatory outcomes. ASIC may make a statement about an investigation when it is in the public interest to do so and will usually issue a media release when it secures a regulatory outcome such as a negotiated agreement.⁵⁴ The ACCC's Compliance and Enforcement Policy states that the ACCC may publicly refer to an administration resolution of a matter that has been in the public domain.⁵⁵ APRA officers have an express statutory authorisation to disclose protected information about activity engaged in, or proposed to be engaged in by APRA in relation to a breach or suspected breach by a person of a provision of a prudential regulation framework law.⁵⁶

⁵³ Ibid s 40-5(1)(f).

⁵⁴ ASIC, *INFO 152 Public comments on ASIC's regulatory activities*.

⁵⁵ ACCC, *2017 ACCC Compliance and Enforcement Policy* 6.

⁵⁶ *Australian Prudential Regulation Authority Act 1998* (Cth) s 56(7A).

Recommendation 12

Amend Subdivision 150-C of the ACNC Act to provide that ACNC officers are authorised to disclose protected ACNC information for the purpose of making a public comment or publishing information about the Commissioner's regulatory activities when it is in the public interest to do so. Specifically, this may include confirming that an investigation has been commenced, disclosing action that the ACNC has taken or is proposing to take in relation to a registered charity or a responsible person and disclosing a regulatory outcome (e.g. that the ACNC and a registered charity have entered into a compliance agreement or that the ACNC has provided regulatory guidance to a registered charity).

Disclosure to other government agencies

- 6.14 Section 150-40 of the ACNC Act allows an ACNC officer to disclose protected ACNC information if:
- (a) the disclosure is to an Australian government agency;⁵⁷ and
 - (b) the ACNC officer is satisfied that the information will enable or assist the Australian government agency to perform or exercise any of the functions or powers of the agency; and
 - (c) the disclosure is for the purpose of enabling or assisting the Australian government agency to perform or exercise any of the functions or powers of the agency; and
 - (d) the disclosure is reasonably necessary to promote the objects of the ACNC Act.
- 6.15 An ACNC officer must be satisfied that all four conditions are met before disclosing the information under s150-40 of the ACNC Act.

It is not clear that an ACNC officer is authorised under s 150-40 to disclose protected ACNC information in bulk to facilitate data matching, analysis and research for criminal intelligence and law enforcement purposes; and to implement arrangements with other regulators to reduce regulatory duplication. In view of the penalties for unauthorised disclosure, the ACNC considers that an express authorisation to disclose information in bulk for these purposes should be included in the Act.

⁵⁷ Australian government agency means the Commonwealth, a State, or a Territory; or an authority of the Commonwealth or of a State or Territory (ACNC Act s 300-5)

Recommendation 13

Amend subdivision 150-C – Authorised Disclosures of the ACNC Act to include a provision that expressly authorises ACNC officers to disclose protected ACNC information in bulk to an Australian government agency if the disclosure is reasonably necessary:

- (a) to enable data-matching, analysis or research for the purpose of assisting that agency or another Australian government agency to carry out its law enforcement or investigatory functions or activities or for the purpose of assisting the ACNC to carry out its functions; or
- (b) to enable the implementation of arrangements between the ACNC and other government agencies for the purpose of reducing regulatory duplication.

Disclosure in the performance of duties

- 6.16 The exception in s.150-30 of the ACNC Act permits disclosure by an ACNC officer of protected ACNC information ‘in the performance of his or her duties under the ACNC Act’. An exception to permit disclosure in the performance of a person’s functions and duties is common in Commonwealth secrecy provisions.⁵⁸ However, the precise wording of such exceptions varies.⁵⁹
- 6.17 If the limiting words ‘under this Act’ were removed from the exception in s.150-30 of the ACNC Act, its operation would be expanded. In particular, ACNC officers would be authorised to disclose protected ACNC information for the purpose of performing duties or functions under other legislation, such as the *Freedom of Information Act 1982* (Cth) (FOI Act).⁶⁰ This wording would also be consistent with the wording of the equivalent exception in the secrecy regime that applies to taxation officers.⁶¹

Recommendation 14

Amend s 150-30 of the ACNC Act by replacing ‘under this Act’ with ‘in the performance of his or her duties as an ACNC officer’.

⁵⁸ Australian Law Reform Commission, *Review of Secrecy Laws – Discussion Paper*, Discussion Paper 74 (2009) [11.4].

⁵⁹ See for example: *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s23E; *Australian Securities and Investments Commission Act 2001* (Cth) s 127; *Australian Prudential Regulatory Authority Act 1998* (Cth) s 56; *Census and Statistics Act 1905* (Cth) s 19.

⁶⁰ The ACNC Act recognises that the Commissioner may have powers and functions conferred or imposed on her ‘by this Act or any other law’: ACNC Act s 110-5(2)(b).

⁶¹ The exception (in s 355-50 of the *Taxation Administration Act 1953* (Cth)), refers to ‘the record or disclosure is made in performing the entity’s duties as a **taxation officer**’.

Disclosure of information that has already been made public

6.18 Under s.150-50 of the ACNC Act, an ACNC officer may disclose or use protected ACNC information that relates to the affairs of an entity if:

- (a) the information has already been lawfully made available to the public; and
- (b) the disclosure is for the purposes of [the] Act.

The ACNC considers that the constraint imposed by para (b) is unnecessary. The Explanatory Memorandum to the bill for the ACNC Act notes that where information is in the public domain, it is accessible by everyone and therefore does not retain its confidential nature.⁶² Further, the fact that the information is lawfully made available to the public is sufficient in and of itself in equivalent provisions in other legislation.

Recommendation 15

Amend s 150-50 by removing the requirement that the disclosure be for the purposes of the ACNC Act.

⁶² Revised Explanatory Memorandum [11.60].

7. Interaction between the ACNC Act and the Corporations Act

Introduction

- 7.1 The ACNC (C&T) Act makes consequential amendments to related Commonwealth legislation to cater for the establishment of the ACNC.⁶³
- 7.2 These consequential amendments include the insertion of Part 1.6 – Interaction with Australian Charities and Not-for-profits Commission Act 2012 into the Corporations Act. Under Part 1.6, a number of provisions of the Corporations Act are ‘turned off’ for bodies corporate that are registered charities so as to minimise regulatory duplication and clarify the delineation of responsibilities between the ACNC and ASIC.

Background and current legislative provisions

Part 1.6 – Interaction with Australian Charities and Not-for-profits Commission Act 2012

- 7.3 The provisions listed in the table in s 111L of the Corporations Act are not applicable to bodies corporate⁶⁴ registered with the ACNC. In summary, these provisions impose the following obligations:
- (a) Requirement for a public company to lodge with ASIC a copy of a special resolution adopting, modifying or repealing its constitution;
 - (b) ASIC’s power to direct company to lodge consolidated constitution;
 - (c) Requirement for company to notify ASIC of changes of address;
 - (d) Civil obligations of directors and other officers to: exercise due care and diligence – act in good faith – not improperly use their position, and – not improperly use company information;
 - (e) Responsibilities of secretaries and directors for certain contraventions;
 - (f) Requirements with respect to interests of directors;
 - (g) Requirements with respect to meetings of members;
 - (h) Requirements with respect to financial reports and audit;
 - (i) Requirement to update ASIC information about companies and registered schemes;
 - (j) Various requirements applying to foreign companies; and
 - (k) Requirement for a registered body to notify ASIC of certain changes.
- 7.4 These requirements have been ‘turned off’ because bodies corporate registered with the ACNC are subject to regulatory oversight by the ACNC.

⁶³ Ibid [15.48]

⁶⁴ Registered charities that are bodies corporate to which the Corporations Act applies may be companies limited by guarantee, proprietary limited companies, registered Australian bodies and registered foreign bodies.

- 7.5 The ACNC has identified certain areas where the ‘turn off’ provisions have created uncertainty for charitable companies.

Issues and proposed changes

Directors’ duties

- 7.6 The civil obligations of directors in ss 180-183 of the Corporations Act (commonly referred to as ‘directors’ duties’) do not apply to the directors of charitable companies.⁶⁵ However, the criminal offences in s 184 of the Corporations Act and the liability of directors with respect to debts incurred while a company is insolvent under s 588G of the Corporations Act continue to apply to them.
- 7.7 ACNC governance standard 5 requires registered charities to take reasonable steps to ensure that its responsible persons (directors, in the case of companies) are subject to and comply with duties that are similar to the directors’ duties in the Corporations Act. Company directors are also subject to certain duties at common law.
- 7.8 Commentators have noted the potential for complexity arising from the multiple regimes to which directors and responsible persons of charities with other legal structures are subject.⁶⁶ However, the ACNC has not experienced practical difficulties in overseeing compliance of registered charities with governance standard 5, and therefore does not recommend any change to the current position.

Statutory assumptions

- 7.9 As public companies, companies limited by guarantee, including those that are registered charities, are required to have a company secretary.⁶⁷ However, the responsibilities of company secretaries under s 188 of the Corporations Act have been turned off to the extent that they relate to other provisions of the Corporations Act that do not apply to charitable companies.⁶⁸
- 7.10 The requirements under the Corporations Act to notify ASIC of certain matters, including change of address and the retirement and appointment of directors and company secretaries have been turned off for companies that are registered charities.⁶⁹ Consequently, ASIC does not maintain this information on its register for charitable companies. An online search of the ASIC database for a charitable company will supply some basic details and a direction to search the ACNC Register for further information, including the address for service, details of responsible persons and financial reports.
- 7.11 Under the Corporations Act:

⁶⁵ Corporations Act s 111L (item 5 in the table). The Revised Explanatory Memorandum at [15.70] confirms that s 111L turns off ‘certain directors’ duties for entities registered with the ACNC, as under the new regime, the responsible entities will be subject to equivalent governance standards that will be specifically tailored to the NFP sector’.

⁶⁶ Ian Ramsay and Miranda Webster “Registered Charities and governance standard 5: An evaluation” (2017) 45 *Australian Business Law Review* 127-128.

⁶⁷ Corporations Act s 204A(2).

⁶⁸ *Ibid* s 111L (item 6 in the table)

⁶⁹ *Ibid* (item 8 in the table)

- (a) a company may execute a document without using a common seal if it is signed by two directors or a director and a company secretary of the company and a company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by two directors and a company secretary of the company;⁷⁰ and
 - (b) in dealings with a company, a person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company has been duly appointed and has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.⁷¹
- 7.12 The ACNC is aware that the inability of third parties such as financial institutions to check the names of the current directors and company secretary of a charitable company by searching the ASIC register may give rise to difficulties.
- 7.13 As the regulatory framework under the ACNC Act is designed to apply to all registered charities, regardless of legal form, a company secretary is not a responsible person and has no responsibilities under the ACNC Act. There is therefore no basis for the ACNC to be required to collect details about the company secretary or for those details to be displayed on the ACNC Register. One solution would be for the notification requirement relating to company secretary details under the Corporations Act to be turned back on for charitable companies and for ASIC to make this information available to the public. However, this would increase the regulatory burden on those entities.
- 7.14 With respect to directors, one way of addressing the issue would be to amend s 129(2) of the Corporations Act to enable a person dealing with an ACNC registered entity that is a company to rely on the assumption of due appointment and authority with respect to anyone who appears from information on the ACNC Register to be a responsible person of the registered entity.

Recommendation 16

Consider options for addressing the issues arising from the inability to check the names of current directors and company secretaries of charitable companies by searching the ASIC register.

Restrictions on directors voting on an issue in which they have a material personal interest

- 7.15 Under s 191(1) of the Corporations Act, a director of a company with a material personal interest that relates to the affairs of the company must notify the other directors of that interest. This requirement is subject to the exemptions specified in section 191(2).

⁷⁰ Corporations Act ss 127(1),(2).

⁷¹ Ibid ss 128(1), 129(2).

- 7.16 Section 195(1) of the Corporations Act, which continues to apply to charitable companies, states that if a director has a material personal interest in a matter that is being considered at a directors' meeting, that director must not:
- (a) be present at the meeting while the matter is being considered; or
 - (b) vote on the matter.
- 7.17 Subsection 1A(b) however states that subsection (1) does not apply if the interest does not need to be disclosed under s 191.
- 7.18 The Corporations Act 'turns off' s 191 for directors of a company registered with the ACNC. It is therefore unclear how s 195 applies to charitable companies.
- 7.19 Under ACNC governance standard 4, a registered charity must take reasonable steps to ensure that its responsible persons comply with the duty to disclose perceived or actual material conflicts of interest.⁷² The Regulation does not specify what steps are to be taken to manage a material conflict of interest.

Recommendation 17

Turn off s 195 of the Corporations Act for charitable companies and amend governance standard 4 to restrict participation in decision making with respect to the governance or management of a registered charity by a responsible person with a material conflict of interest.

Definition of special resolution

- 7.20 Under the Corporations Act, companies are required to pass a special resolution when certain actions are taken⁷³. Charitable companies are not exempt from this requirement.
- 7.21 Section 9 of the Corporations Act defines a special resolution to mean a resolution:
- (a) of which notice as set out in paragraph 249L(1)(c) has been given; and
 - (b) that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution.
- 7.22 Section 249L(1)(c) provides that if a special resolution is to be proposed at a meeting of members, the notice of the meeting must set out an intention to propose the special resolution and state the resolution.
- 7.23 The ACNC C&T Act provides, in effect,⁷⁴ that from 1 July 2013 the provisions relating to meetings of members of companies in the Corporations Act, including section 249L, will no longer apply to a company registered under the ACNC Act.

⁷² ACNC Regulation s 45.25(2)(e).

⁷³ A special resolution is required to amend a company's constitution, change a company's name or change company type: See ss 136, 157, 162 and 163 of the Corporations Act. These provisions have not been 'turned off' in s 111L of the Corporations Act.

⁷⁴ Schedule 3, Part 3, Division 2 of the ACNC (C&T Act), when read together with the Corporations Act ss 111K and 111L.

- 7.24 Although the definition of special resolution has not been ‘turned off’, it is incomplete without the application of s 249L and it is therefore unclear how the definition is to apply when charitable companies are required to pass special resolutions.

Recommendation 18

Amend the Corporations Act to provide clarity for charitable companies as to the requirements for a special resolution.

Requirement to appoint an auditor

- 7.25 The financial reporting requirements of a registered charity under the ACNC Act differ depending on whether it is classified as small, medium or large on the basis of the amount of its annual revenue.⁷⁵
- 7.26 The ACNC Act requires medium and large registered charities to give the Commissioner annual financial reports. A large registered charity must have its financial reports audited.⁷⁶ A medium registered company may choose to have its financial reports audited or reviewed, unless the Commissioner gives a notice removing the ‘review’ option.⁷⁷ The Commissioner may give such a notice if there have been previous problems or non-compliance by the charity.⁷⁸
- 7.27 The financial reporting requirements in the Corporations Act have been turned off for charitable companies. However, the requirements for a public company to appoint an auditor in ss 327A and 327B of the Corporations Act have not been turned off.⁷⁹
- 7.28 Section 327A(1A) provides that the requirement to appoint an auditor does not apply to companies limited by guarantee:
- (a) that may have their financial reports reviewed pursuant to s 301(3); or
 - (b) that fall within the definition of a small company limited by guarantee.
- 7.29 Section 301(3) allows companies limited by guarantee with revenue of less than \$1 million to have financial reports reviewed rather than audited. For the purposes of a review, a chartered accountant or a certified practising accountant is deemed to be a registered company auditor.⁸⁰ However s 301(3) falls within Part 2M.3 of the Corporations Act, a part ‘turned off’ for charitable companies. Consequently, the exemption in s 327A(1A) from appointing an auditor does not apply to medium

⁷⁵ For the revenue thresholds for each classification see [8.19].

⁷⁶ ACNC Act s 60-25.

⁷⁷ Ibid s 60-20.

⁷⁸ Ibid.

⁷⁹ Only an individual who is a registered company auditor or a company that is an authorised audit company may consent to be appointed as an auditor of a company: Corporations Act ss 324BA--324BC. If a firm consent to be appointed as an auditor of a company, the members of the firm commit an offence unless the firm satisfies certain requirements at the time of the appointment: Corporations Act s 324BB.

⁸⁰ See Corporations Act s 324BE.

registered charities that are companies limited by guarantee, even though a medium registered charity may generally choose to have its financial reports reviewed rather than audited under the ACNC Act.⁸¹

- 7.30 Similarly, the exemption in paragraph (b) of s 327A(1A) does not apply to all small registered charities because, while the same revenue threshold applies to 'small company limited by guarantee', as for a small registered charity, the definition of the latter excludes companies with deductible gift recipient status.⁸²
- 7.31 The financial reporting requirements in the ACNC Act are proportional to the size of the registered charity. However, the intended effect of the provisions is undermined by the requirement for small registered charities with DGR status and medium registered charities to appoint an auditor under the Corporations Act. This needs to be addressed. In the ACNC's view, the simplest solution is to turn off the provisions requiring the appointment of an auditor for charitable companies.

Recommendation 19

Amend the Corporations Act to turn off the requirement to appoint an auditor in ss 327A and 327B for charitable companies, or at least for charitable companies that are small or medium registered companies.

⁸¹ ACNC Act s 60-20.

⁸² Corporations Act s 45B(1).

8. Reporting requirements

Introduction

- 8.1 The reporting requirements for registered charities are set out in Division 60 of the Act.
- 8.2 The ACNC may only require charities to report information that relates to or is for the purpose of enabling recognised assessment activities to be carried out.⁸³

Annual information statements

- 8.3 All registered charities must submit an annual information statement to the ACNC, except corporations that are also registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act).⁸⁴
- 8.4 The annual information statement includes information about a charity's activities and finances.

Annual financial reports

- 8.5 Medium and large registered charities (other than basic religious charities) are also required to provide annual financial reports to the ACNC. Large registered charities must have their financial reports audited. Medium registered charities can choose to have their financial reports audited or reviewed.

Impact reporting

- 8.6 Reporting on impact is often raised in the context of accountability mechanisms for charities. This type of reporting is already being undertaken by some charities that are aiming to increase transparency and provide more information about the way they are performing to meet their charitable purpose. One of the issues in relation to reporting on impact is the absence of a framework to assess performance and report it. This means that different organisations may track, monitor, assess, measure and report differently, leading to a lack of consistency.
- 8.7 Charitable organisations in New Zealand are required to complete performance reporting accordance with a new reporting standard introduced by the New Zealand External Reporting Board. The standard mandates reporting on the entity's outputs with optional reporting on the outcomes the entity is seeking to influence.
- 8.8 The ACNC is interested and active in discussions on this issue and cognisant of the complexities involved in developing useful and consistent measures of impact. The ACNC also considers that the question of whether the ACNC's reporting regime is the appropriate vehicle for impact reporting should be carefully considered.

⁸³ ACNC Act s 60-5(3) and s 60-15(2). A recognised assessment activity is (a) an activity carried out the by ACNC Commissioner involving assessment of a registered entity's entitlement to registration as a type or subtype of entity; or (b) an activity carried out the by Commissioner involving assessment of an entity's compliance with the ACNC Act and the regulations; or (c) an activity carried out the Commissioner of Taxation involving assessment of any entity's compliance with any taxation law: ACNC Act, s 55-10.

⁸⁴ These corporations are primarily regulated by ORIC, and their reports to ORIC are shared with the ACNC.

Reduction of regulatory burden

Use of charity passport

- 8.9 As part of the ACNC's 'report once, use often' reporting framework, the ACNC has worked with Commonwealth, state and territory agencies to share information on registered entities through the 'charity passport'. By allowing agencies to access charity data directly from the ACNC, the charity passport reduces the amount of information that charities must provide to different government agencies.
- 8.10 Data from the charity passport can be used to pre-populate details in the Commonwealth government systems such as GrantConnect, the Australian government's grants information system.
- 8.11 The ACNC notes that under the *Commonwealth Grants Rules and Guidelines 2017*,⁸⁵ Commonwealth officials must have regard to information that is collected by Australian Government regulators and available to them.
- 8.12 Whole-of-government guidelines such as this and other initiatives to promote the use of the Charity Passport will contribute to reducing the regulatory burden on charities.

Recommendation 20

That the Commonwealth government promote the use of the ACNC's charity passport by Commonwealth, State and Territory agencies so as to reduce the regulatory burden on charities.

Reporting framework for charities

- 8.13 The AASB has identified as part of its recent outreach project "Improving Financial Reporting for Australian Charities" that there are concerns in relation to the current reporting framework for charities due to the subjective nature of the reporting entity concept and its practical application. The ACNC supports a better financial framework for charities that will allow greater consistency and comparability in financial reporting to underpin trust and confidence in the sector in accordance with the first object of the ACNC Act. For example, the costs of fundraising continues to be a matter of concern. Currently, there is no consistent measure of these costs. The ACNC would encourage further examination of this issue.
- 8.14 The current reporting framework and identified issues are outlined in the AASB's recent report *Financial Reporting Requirements Applicable to Charities*.⁸⁶
- 8.15 The AASB has also released a discussion paper that provides potential options for improving the current reporting framework.⁸⁷
- 8.16 The ACNC sees value in a wider conversation about the reporting requirements for registered charities, and, in particular, whether registered charities should continue to have the option of providing special purpose financial statements.

⁸⁵ Department of Finance, *Commonwealth Grants Rules and Guidelines 2017* [4.9], [8.4].

⁸⁶ AASB, *AASB Research Report No 5 - Financial Reporting Requirements Applicable to Charities* (October 2017).

⁸⁷ AASB, *AASB Discussion Paper: Improving Financial Reporting for Australian Charities* (November 2017),

- 8.17 The ACNC size thresholds were drawn from the Corporations Act for consistency. There are differing views about the appropriateness of the current size thresholds and the limitations of revenue as the single determinant of size. The ACNC suggests that these matters should be considered as part of the Review to ensure there is proportionate and appropriate reporting by registered charities which is consistent within each tier.
- 8.18 The ACNC considers that the ACNC and AASB should undertake further work in consultation with the sector to develop a suitable reporting framework for charities, with the aim of ensuring that reporting is proportionate and consistent according to the size of an entity.

Recommendation 21

Further work to be undertaken by the ACNC and AASB in consultation with the sector to develop a suitable reporting framework for registered charities.

Proposed changes

Annual application of proportional reporting requirements based on revenue thresholds

Current legislation

- 8.19 The reporting requirements of registered charities under the ACNC Act are proportional to the size of the entity, based on a revenue threshold.⁸⁸ There are three tiers of reporting: small, medium and large entities:
- (a) A **small** registered entity is an entity with annual revenue of less than \$250,000;⁸⁹
 - (b) A **medium** registered entity is an entity with annual revenue of less than \$1 million that is not a small registered entity;⁹⁰ and
 - (c) A **large** registered entity is an entity with annual revenue of \$1 million or more.⁹¹
- 8.20 Revenue is calculated in accordance with the relevant accounting standards issued by the Australian Accounting Standards Board.⁹²
- 8.21 Charity size impacts on charity obligations in a number of ways:
- (a) The Annual Information Statement (AIS) for the 2014 reporting period onwards has collected financial elements proportional to charity size.
 - (b) There are different requirements for financial reports depending on the charity's annual revenue [Division 60]. For the 2014 reporting period onwards,

⁸⁸ Ibid s 60-3(3).

⁸⁹ Ibid s 205-25(1).

⁹⁰ Ibid s 205(25)(2).

⁹¹ Ibid s 205(25)(3).

⁹² Ibid s 205(25)(4).

with the exception of basic religious charities, the requirements that apply to categories of charities have been:

- (i) for small charities (with annual revenue of less than \$250,000) and basic religious charities—no financial reports are required;
 - (ii) for medium charities (with annual revenue of more than \$250,000 but less than \$1 million)—financial reports are required and must be either reviewed or audited; and
 - (iii) for large charities (with annual revenue of more than \$1 million)—financial reports are required and must be audited.
- (c) Size affects the amount of time a charity has to notify the ACNC of certain changes, including the charity’s legal name, service address, responsible persons and governing rules or of a material error in AIS or financial report.⁹³
- (d) Administrative penalties are imposed automatically on charities for failing to lodge certain documents required under the Act on time.⁹⁴ The size of the penalties depends in part upon the size of the charity.
- 8.22 To enable a flexible approach where unexpected financial events occur that would require an entity to meet the reporting requirements of a higher tier for a single year (including the costs of audited financial reports), the Commissioner has the discretion to treat the entity as being in a lower tier for the purpose of reporting obligations for that financial year.⁹⁵
- 8.23 To exercise this discretion the ACNC Commissioner must be of the opinion that the entity, while not a particular size for a reporting period, was that size for the previous reporting period, and is likely to return to that size in the next period.
- 8.24 The Revised Explanatory Memorandum explains that this approach ensures that an unnecessary compliance burden is not placed on registered charities as a result of unexpected or unusual financial events.⁹⁶

Possible changes

- 8.25 The Commissioner has the discretion to continue to treat a registered charity as being in a lower tier in some circumstances. The requirement to apply to the Commissioner to exercise this discretion imposes a degree of administrative burden. Additionally, it is common for charities (especially small charities) to only identify the change in their reporting requirements (particularly the need to provide audited or reviewed financial reports) at the time of completing their AIS. This means that these charities are at risk of penalties for late lodgement due to the delay in submission of the AIS while they seek to obtain the Commissioner’s discretion or produce the required audited/reviewed reports.
- 8.26 There has been a steady increase in the number of requests for exercise of the Commissioner’s discretion, with 95 requests processed from 1 July 2016 to 30 June 2017, up from 64 and 57 for the previous two years.
- 8.27 A more flexible approach and less administratively burdensome approach would be to allow a charity to self-assess its size by considering the current year and the immediately previous reporting period (‘lookback’ period). The charity’s size in any

⁹³ Ibid ss 65(5), 60-65.

⁹⁴ Ibid s 175-35.

⁹⁵ Ibid s 125-25(5).

⁹⁶ Revised Explanatory Memorandum [6.30].

given reporting period would be the lower of its current and immediately previous reporting period revenues.

8.28 For example:

Charity Foundation A has revenue of \$100,000 in the 2018 reporting period, making it a small charity in that period. The charity's revenue in the 2019 reporting period is \$300,000.

Using the 'lookback' approach, the charity, which would otherwise be required to report as a medium charity for the 2019 reporting period, can instead be treated as a small charity for that period.

In the 2020 reporting period the charity's revenue again increases to \$400,000. This puts it in the medium charity tier, as does the 2019 period revenue of \$300,000. As the lookback approach is for one year only, the charity is required to report as a medium charity in the 2020 reporting period.

8.29 Newly established charities may experience an unexpected or unusual financial event in their first reporting period. For example, some types of charities, particularly philanthropic funds often receive a large donation of capital in the first year, followed by much lower levels of investment revenue in subsequent reporting periods. For such newly registered charities, a 'look forward' approach could be considered.

Recommendation 22

Consider whether registered charities should be able to self-assess their size for reporting purposes in a particular reporting period taking into account the immediately previous reporting period, or in the case of newly established charities, the projected revenue for the following reporting period.

Discretion to accept reports provided to other agencies

- 8.30 Part 4 of Schedule 1 to the C&T Act sets out transitional provisions with respect to reporting. Item 10 provides that the Commissioner may treat a statement, report or other document given under an Australian law to an Australian government agency by a registered charity as being an annual information statement or an annual financial report.
- 8.31 The discretion may be exercised for the 2012-13 to 2016-17 financial years and any later financial year prescribed by regulations.
- 8.32 The ACNC has advanced initiatives to reduce unnecessary reporting, and to implement a report once-use often framework, in pursuit of the third object of the ACNC Act.
- 8.33 It has become evident that the level of accountability and reporting required for registered charities in the education sector cannot be adequately met through making available to the relevant government agencies the annual information statements and annual financial reports submitted by non-government schools to the ACNC. The ACNC has therefore worked with the Commonwealth Department of Education to implement streamlined reporting arrangements for the ACNC to access reports submitted by non-government schools to the Department, rather than requiring them to submit separate reports to the ACNC. The arrangements are based on the exercise of the Commissioner's discretion in Part 4 of Schedule 1 to the ACNC (C&T) Act.

- 8.34 The ACNC envisages that it may be appropriate to implement similar streamlined reporting arrangements for registered charities in other ‘highly regulated’ sectors.
- 8.35 To enable the ACNC to enter into continuing streamlined reporting arrangements with Australian government agencies where appropriate, the ACNC considers that the Commissioner should have an ongoing discretion to treat reports given by registered charities to other Australian government agencies, or certain information from such reports, as being an annual information statement or an annual financial statement.

Recommendation 23

Amend the ACNC Act by including an ongoing provision in Division 60 of the ACNC Act based on Item 10 (1)-(3) of Part 4 in Schedule 1 to the ACNC (C&T) Act.

Auditor’s obligations

- 8.36 Section 311 of the Corporations Act requires the auditor, audit company, and the lead auditor (as the case may be) to report to ASIC if, in the conduct of an audit, the auditor or lead auditor is aware of circumstances that:
- (a) they have reasonable grounds to suspect amount to a significant contravention of the Corporations Act or a contravention that has not been or will not be adequately dealt with by commenting on it in the auditor’s report or bringing it to the attention of the directors;
 - (b) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit; or
 - (c) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit.
- 8.37 The ACNC considers that an auditor should be under a similar duty to notify the ACNC in relation to the conduct of the audit of a registered charity.

Recommendation 24

Amend the ACNC Act by including in Subdivision 60-C a provision imposing a duty on an auditor to report to the ACNC if, in the conduct of an audit of a registered charity, the auditor is aware of circumstances that:

- (a) they have reasonable grounds to suspect amount to a significant contravention of the ACNC Act or a contravention of the ACNC Act that has not been or will not be adequately dealt with by commenting on it in the auditor’s report or bringing it to the attention of the registered charity’s responsible persons;
- (b) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit; or
- (c) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit.

Sections 60-30 – audit or review

- 8.38 An audit of a registered charity’s financial report must be undertaken by a registered company auditor, an audit firm or an authorised audit company within the meaning of the Corporations Act.⁹⁷
- 8.39 The regulations may prescribe other entities that can undertake an audit or review.⁹⁸ However, to date no other entities have been prescribed for this purpose.
- 8.40 Section 60-30(2) provides that in the case of a review of a medium registered charity’s financial report, an individual who is taken to be a registered company auditor under s 324BE(1) of the Corporations Act is taken to be a registered company auditor for the purposes of the charity’s reporting requirements.
- 8.41 An individual is taken to be a registered company auditor under s 324BE (1) of the Corporations Act if the individual is a member of a professional accounting body and holds the relevant designation of that professional body prescribed by the Corporations Regulations. For example, a member of the Institute of Chartered Accountants (CA) in Australia must have the CA designation and a member of Certified Practising Accountants Australia (CPA Australia) must have the CPA designation.
- 8.42 The ACNC is aware of the ongoing challenge for some charities to source a registered company auditor due to the diminishing numbers of such auditors in Australia. This is particularly the case for charities in remote and regional areas. The issue is compounded by the increasing number of reporting requirements that mandate the provision of assurance by a registered company auditor.

Recommendation 25

Amend the ACNC Act to give the Commissioner a discretion to permit a person who is taken to be a registered company auditor under s 324 BE(1) of the Corporations Act to undertake an audit of a large registered charity if the Commissioner reasonably believes that the requirement to have the audit undertaken by an entity specified in s 60-30 (1) will impose an unreasonable burden on that charity.

Sections 60-45(3)(b) and 60-50(3)(b) – Auditor’s and Reviewer’s report on annual financial report

- 8.43 Section 60-45(3)(b) of the Act requires that the auditor’s report must describe ‘any deficiency, failure or shortcoming in respect of the matters mentioned in paragraph 60-30(3)(b), (c) or (d)’.
- 8.44 Section 60-50(3)(b) of the Act requires that the reviewer’s report must describe ‘any deficiency, failure or shortcoming in respect of the matters mentioned in paragraph 60-30(4)(b), (c) or (d)’.
- 8.45 The ‘materiality’ of a matter is determined having regard to whether it would affect the decision making of the users of a report. The requirement to describe ‘any

⁹⁷ ACNC Act s 60-30(1).

⁹⁸ Ibid s 60-30(1)(d).

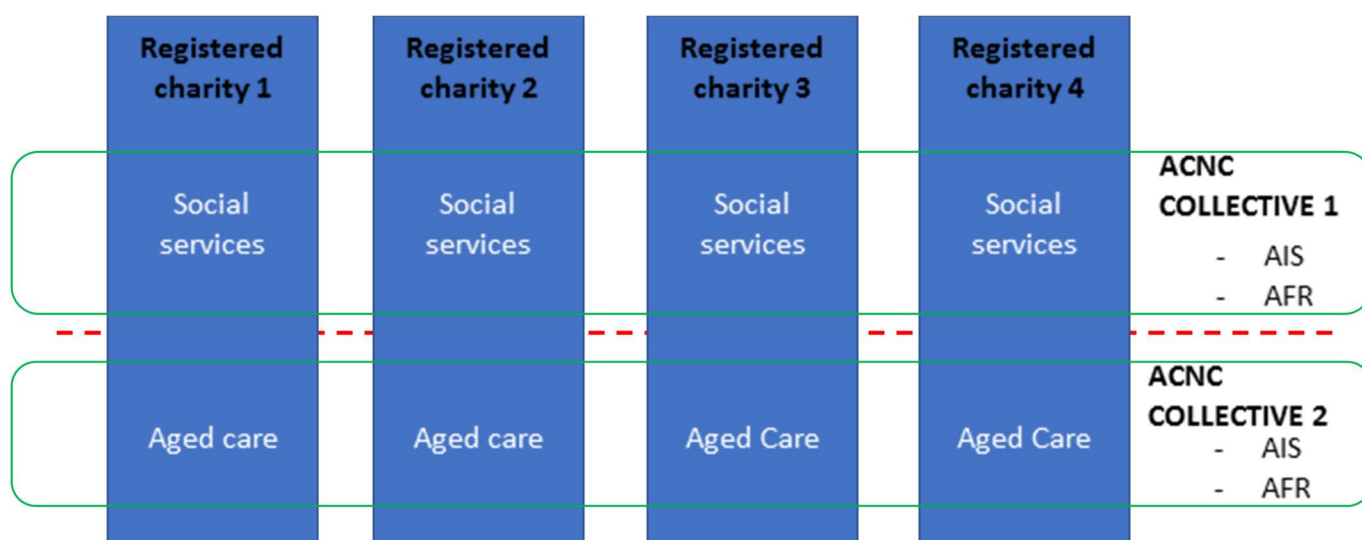
deficiency, failure or shortcoming' regardless of materiality is onerous for auditors and is inconsistent with the 'materiality' basis of the overarching financial reporting framework. It may also be misleading to users of the report and impact unfairly on a charity's reputation.

Recommendation 26

Amend ss 60-45(3)(b) and 60-50(3)(b) of the ACNC Act to confine the requirement to 'material' deficiencies, failures or shortcomings.

Section 60-95(2) Collective Reporting

- 8.46 Under s 60-95(2) of the ACNC Act, the Commissioner may allow a reporting group to prepare and lodge one or more information statements, or one or more single information statements and one or more single financial reports, in relation to the reporting group for a financial year on a basis other than an entity-by-entity basis ('collective reporting').
- 8.47 Collective reporting is the reporting by two or more affiliated charities on the basis of their common functions, activities or purposes rather than on an entity-by-entity basis.
- 8.48 An illustrative example is set out below.



- 8.49 To the date of this submission, the ACNC has not received any requests to allow collective reporting.
- 8.50 The ACNC considers that the benefits of collective reporting are unclear, for three reasons. First, unlike joint reporting, collective reporting does not reduce the administrative burden on charities, since a separate report is required for each function, activity or purpose. Secondly, comprehensibility and comparability of collective reports are low due to lack of generally accepted standards for collective reporting. Consequently, reporting on a collective basis is likely to decrease rather than increase transparency.

- 8.51 Accordingly, the ACNC recommends the repeal of s 60-95(2) of the ACNC Act.

Recommendation 27

Repeal s 60-95(2) of the ACNC Act so as to remove the Commissioner's power to allow collective reporting.

Regulation 60.30 – Special purpose financial statements

- 8.52 Division 60 of the ACNC Regulation sets out the requirements for annual financial reports of registered charities.
- 8.53 The annual financial report consists of the registered charity's financial statements for the reporting period, the notes to the financial statements and the responsible persons' declaration about the statements and the notes. The financial statements are those that are required to be prepared by the accounting standards issued by the AASB for the purpose of the Corporations Act. If a medium or large registered charity is a 'reporting entity' as defined by the accounting standards, it must prepare a general purpose financial statement. If it is not a reporting entity it may prepare a special purpose financial statement that complies with specified accounting standards.⁹⁹
- 8.54 The accounting standard AASB 124 – Related Party Disclosures is not one of the specified standards for special purpose financial statements prepared by registered charities.
- 8.55 The objective of AASB 124 is 'to ensure that an entity's financial statements contain the disclosures necessary to draw attention to the possibility that its financial position and profit or loss may have been affected by the existence of related parties and by transactions and outstanding balances, including commitments, with such parties.'
- 8.56 In 2016 the ACNC introduced additional questions in the AIS to ask whether charities had related party transactions and whether charities had documented policies and processes for related party transactions.
- 8.57 This information is relevant to assessing whether a registered charity meets the definition of charity in the Charities Act – in particular, whether it is providing non-incident private benefits - and its compliance with governance standards 1 and 5. The ACNC therefore considers that AASB 124 should, at a minimum, apply in relation to a registered charity that is preparing a special purpose financial statement.
- 8.58 The ACNC notes in this connection that the adoption by the AASB of the revised International Accounting Standards Board *Conceptual Framework for Financial Reporting* in Australia will involve the removal of Statement of Accounting Concepts 1 – the definition of a 'reporting entity'. This will in turn affect the ability of an entity required by legislation to prepare financial statements in accordance with the accounting standards to prepare special purpose financial statements if it concludes that it is not a 'reporting entity' as currently defined. The AASB indicated in its board meeting on 12 December 2017 that it will develop a consultation paper on the IASB

⁹⁹ ACNC Act s 60-30.

Conceptual Framework which includes options to address this issue.¹⁰⁰ If special purpose financial statements became redundant it would be necessary to remove the references to them throughout the ACNC legislation.

Recommendation 28

Subject to the implications of the adoption by the AASB of the IASB Conceptual Framework for Financial Reporting in Australia, amend the table in s 60.30 of the ACNC Regulation by adding AASB 124 – Related Party Disclosures.

¹⁰⁰ Australian Accounting Standards Board, *AASB Action Alert Issue No 188* 13 December 2017 (http://www.aasb.gov.au/admin/file/content102/c3/188-AASB_Action_Alert_12_12_2017.pdf).

9. Other issues

Introduction

- 9.1 In this section, we propose a number of ‘fine-tuning’ amendments to the ACNC Act and the ACNC Regulation to remove anomalies and inconsistencies, address gaps and improve clarity.

ACNC Act

Section 35-10(1) – Revoking registration

- 9.2 The Commissioner may revoke the registration of a registered charity if the Commissioner reasonably believes that any of the conditions outlined in s 35-10(1) of the Act are met.
- 9.3 The Commissioner may revoke the registration of a registered charity if a trustee in bankruptcy, a liquidator or administrator has been appointed to it or if the registered charity requests revocation. However, it is not currently a ground for revocation that the charity has ceased to operate.
- 9.4 Consequently, if a charity that has ceased to operate does not apply for revocation, the Commissioner must currently rely on a breach of the reporting obligations or of governance standard 1 to revoke its registration.

Recommendation 29

Amend s 35-10(1) of the ACNC Act to include as a ground upon which the Commissioner may revoke a charity’s registration that the registered charity has ceased to operate.

Section 70-5 – Information gathering and monitoring powers

- 9.5 Currently, the enforcement powers contained in Part 4-1 of the Act can only be exercised with respect to a registered charity that is a federally regulated entity (FRE).
- 9.6 A FRE is defined in s 205-15 of the Act as:
- (a) a constitutional corporation; or
 - (b) a trust, all of the trustees of which are constitutional corporations; or
 - (c) a body corporate that is taken to be registered in a Territory under s 119A of the Corporations Act 2001; or
 - (d) a trust, if the proper law of the trust and the law of the trust’s administration are the law of the Territory; or
 - (e) an entity, the core or routine activities of which are carried out in or in connection with a Territory.
- 9.7 In order to determine whether a registered charity is a FRE, the ACNC may need information about the charity that is not provided in its annual reporting.

- 9.8 For example, one type of FRE is a constitutional corporation, defined for the purposes of ACNC Act as a corporation to which paragraph 51 (xx) of the Constitution applies or a body corporate that is incorporated in a Territory.¹⁰¹ Section 51 (xx) of the Constitution applies to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. To determine if a registered charity is a 'trading or financial corporation' it is necessary to assess whether its trading or financial activities form a sufficient significant proportion of its overall current activities as to merit its description as a trading or financial corporation, or are a substantial and not merely peripheral activity of the corporation.¹⁰² This assessment is made on the basis of financial information about the corporation, and, in particular, the revenue or income of the corporation derived from various types of activities, including trading or financial activities.
- 9.9 The information that a registered charity under investigation has provided in compliance with its reporting obligations under the ACNC Act is often not sufficient to make an assessment of whether it is a 'trading or financial corporation' (assuming this is the only basis on which it may be a FRE). There is currently no mechanism in the Act to enable the ACNC to compel the charity to provide the additional information that may be required to make this assessment. As a result, the ACNC may be unable to determine whether it can use the enforcement powers in Part 4-2 of the ACNC Act to address non-compliance by the charity.

Recommendation 30

Amend s 70-5 of the ACNC Act to enable the Commissioner to require an entity to provide information or documents necessary to determine whether a registered entity is a 'federally regulated entity'.

Section 75-5 – Provisions subject to monitoring

- 9.10 Section 75-5 of the Act sets out the provisions subject to monitoring under Division 75. Section 75-5(f) provides that a provision of the Act creating a condition is subject to monitoring if (i) compliance with the condition is necessary for an entity to be entitled to registration as a type or subtype of entity; or (ii) non-compliance with the condition may lead to an entity having its registration as a type or subtype of entity revoked. The note to this provision states that the conditions referred to are contained in s 25-5 (Entitlement to registration) and 35-10 (Revoking registration).
- 9.11 Section 35-10(1) of the Act provides that the Commissioner may revoke the registration of a registered entity if the Commissioner reasonably believes that any of the conditions set out in s 35-10(1) are met. It is not a provision that *creates conditions* that non-compliance with which may lead to an entity having its registration as a type or subtype of entity revoked.

¹⁰¹ ACNC Act s 205-20.

¹⁰² *R v Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian National Football League* (1979) 143 CLR 190; *State Superannuation Board (Vic) v Trade Practices Commission* (1982) 150 CLR 282.

Recommendation 31

Amend the note to s 75-5(1) of the ACNC Act by removing the reference to s 35-10.

Sections 100-10(4) and 100-15(3) – Suspension and removal of responsible entities

- 9.12 Division 100 of the Act sets out the Commissioner’s powers to suspend and remove responsible persons.
- 9.13 Before removing or suspending a responsible person, the Commissioner must give a show cause notice to the registered charity, but there is no requirement to give the notice to a responsible person.¹⁰³
- 9.14 If the Commissioner decides to suspend or remove a responsible person, the Commissioner must give the responsible person a written notice setting out the decision.¹⁰⁴ The responsible person may object to the decision.¹⁰⁵

Recommendation 32

Consider amending the ACNC Act to require a show cause notice to be given to the relevant responsible person as well as to the registered charity before suspending or removing the responsible person and to give notice of the decision to suspend or remove a responsible person to the registered charity as well as to the responsible person.

Section 115-55 – Delegation

- 9.15 Under s 115-55 of the Act, the Commissioner can delegate the Commissioner’s powers and functions to an SES employee, or acting SES employee, who is a member of the staff assisting the Commissioner.
- 9.16 Of the staff assisting the Commissioner, only the two Assistant Commissioners are SES employees. For administrative convenience, the Assistant Commissioners have authorised other members of staff to exercise functions and powers of a relatively routine nature on their behalf. However, the ACNC takes the view that it is not appropriate to authorise the performance or exercise of functions or powers that may involve significant consequences for the entity in relation to which they are exercised.
- 9.17 The ACNC considers that giving the Commissioner a broader delegation power would facilitate more efficient decision making by enabling the Commissioner to

¹⁰³ Ibid ss 100-10(4), 100-15(3).

¹⁰⁴ Ibid ss 100-10(3), 100-15(2).

¹⁰⁵ Ibid ss 100-10(10), 100-15(7).

delegate the performance or exercise of functions or powers of this kind to appropriately experienced staff.

Recommendation 33

Amend s 115-55 of the ACNC Act:

- (a) to enable:
 - (i) the Commissioner to delegate any function or power to any member of the staff assisting the Commissioner; and
 - (ii) SES employees assisting the Commissioner to sub-delegate any function or power to any other member of the staff assisting the Commissioner who has the expertise to exercise the function or power being delegated; and
- (b) to provide that in exercising a delegated or sub-delegated function or power, the delegate or sub-delegate must comply with any directions given by the delegator or sub-delegator.

Section 175-35 – Penalties for failing to lodge documents on time

- 9.18 Section 175-35 of the Act provides that a registered charity entity is liable to an administrative penalty if it fails to give a report, return, notice, statement or other document to the Commissioner in an approved form by the due date.
- 9.19 Under Subdivision 60-C of the Act, annual financial reports (AFR) are not required to be in an approved form.
- 9.20 Further, the additional reporting requirements pursuant to ss 60-75 and 60-80 of the Act allow the Commissioner to make a determination that a charity or class of charities give, in addition to the Annual Information Statement (AIS) and/or AFR, an additional report, or additional information, or meet additional requirements in relation to the manner in which an AIS or AFR is prepared. Additional reports are not required to be given in an approved form.
- 9.21 As administrative penalties under s 175-35 apply only for late lodgement of a document in an approved form, they do not apply to late lodgement of an AFR (notwithstanding the note to s 60-1) or an additional report required pursuant to a determination under s 60-75 (1)(a) or s 60-80 (1)(a).

Recommendation 34

Amend the ACNC Act to provide that late submission of an annual financial report or an additional report attracts an administrative penalty under s 175-35 of the Act.

Section 205-35(5)(a) – Definition of basic religious entity

- 9.22 Section 205-35(5)(a) of the Act provides that an entity is not a basic religious entity (BRC) at a time if:

- (a) the total of the grants (however described) (if any) it receives from Australian government agencies in a financial year exceeds \$100,000; and
 - (b) the financial year is (i) the financial year in which the time occurs; or (ii) either of the previous 2 financial years.
- 9.23 An Australian government agency is (a) the Commonwealth, a State or a Territory; or (b) an authority of the Commonwealth or of a State or a Territory.¹⁰⁶
- 9.24 The Explanatory Memorandum states that the definition of Australian government agency does not include local government.¹⁰⁷

However, the definition does not expressly exclude local government and the phrase ‘authority of the State’ has been held to extend to a local government authority if it has been established by State legislation, performs the functions of a State government and is under the ultimate control of the State.¹⁰⁸

Recommendation 35

Amend the definition of ‘Australian government agency’ in s 300-5 of the ACNC Act to clarify whether it includes or excludes local government authorities or amend s 205-35(5)(a) of the ACNC Act to clarify whether grants from local government authorities are to be taken into account in determining whether an entity is in receipt of government grants exceeding the threshold amount.

Application of exemption in s 38 FOI Act to protected ACNC information

- 9.25 The exemption set out in s 38 of the *Freedom of Information Act 1982* (Cth) (FOI Act) relating to protected information applies if:
- (a) disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment; and
 - (b) either that provision is specified in Schedule 3 to the FOI Act or section 38 is expressly applied to the document, or information, by that provision, or by another provision of that or any other enactment.

The ACNC secrecy provisions are not specified in Schedule 3, nor is there a provision in the Act or in another Act that applies s 38 to protected ACNC information.

¹⁰⁶ S 300-5 ACNC Act

¹⁰⁷ Revised Explanatory Memorandum [13.88].

¹⁰⁸ *Stack and others v Brisbane City Council and others* (1995) 131 ALR 333.

Recommendation 36

Either:

- (a) Amend the ACNC Act by introducing a provision of the kind referred to in s 38(1)(b)(ii) of the FOI Act; or
- (b) Specify Division 150 of the ACNC Act in Schedule 3 to the FOI Act.

ACNC Regulation

Governance standard 5—Duties of responsible entities

Requirement to declare conflicts of interest – anomalies in the application to trustees

- 9.26 A registered charity is required under governance standard 5 to take reasonable steps to ensure that its responsible persons are subject to and comply with a number of duties, including disclosing actual or perceived material conflicts of interests.¹⁰⁹
- 9.27 The responsible person must disclose the perceived or actual material conflict of interest:
- (a) if the responsible entity is a director of the registered entity – to the other directors (if any); or
 - (b) if the registered entity is a trust, and the responsible entity is a director of a trustee of the registered entity – to the other directors (if any); or
 - (c) if the registered entity is a company – to the members of the registered entity; or
 - (d) in any other case – unless the Commissioner provides otherwise.¹¹⁰
- 9.28 This has two consequences for the disclosure of conflicts by a trustee of a trust:
- (a) A trustee that is a natural person will have to make a conflict of interest disclosure to the Commissioner, regardless of whether there are other trustees.
 - (b) Where a trustee company is not a sole trustee, there is no obligation for a conflicted director of the trustee company to disclose the conflict to the other trustees.
- 9.29 There does not appear to be any reason why a natural person trustee should be required to disclose a conflict to the Commissioner if there are other trustees to

¹⁰⁹ ACNC Regulation s 45.25(2)(e).

¹¹⁰ Ibid s 45.25(3).

whom the disclosure could be made. Further, from a governance perspective, it would be more appropriate for the disclosure to be made to the other trustees.

Recommendation 37

Amend s 45.25 (3) of the ACNC Regulation to provide that if a registered entity is a trust with more than one responsible entity, then each responsible entity must disclose any conflicts of that responsible entity to all the other responsible entities.

Duty to manage conflicts of interest

- 9.30 The duty of a responsible person in s 45.25(2)(e) of the ACNC Regulation is to *disclose* material conflicts of interest. There is no duty to *manage* declared conflicts.
- 9.31 It is important that a registered charity has mechanisms in place to manage conflicts of interest.

Recommendation 38

Amend s 45.25(2)(e) of the ACNC Regulation to add a requirement that conflicts of interest are managed appropriately.

Regulation 45.150 – Disqualified Responsible Entities Register

- 9.32 Section 45.20(4) of the ACNC Regulation provides that the Commissioner may disqualify an entity from being eligible to be a responsible entity if:
- (a) the entity has been previously suspended, or removed, under Division 100 of the Act as a responsible entity of a registered entity;
 - (b) the entity has been given notice of its disqualification by the Commissioner; and
 - (c) the Commissioner reasonably believes that the disqualification is justified having regard to the objects of the Act.
- 9.33 Under s 45.150 of the ACNC Regulation, the Commissioner is required to maintain a Disqualified Persons Register including the name of the responsible person, the date of disqualification and whether the disqualification remains subject to review.
- 9.34 However, the name of the responsible person only is not sufficient to enable accurate identification of the responsible person.

Recommendation 39

Amend s 45.150 of the ACNC Regulation to require the date of birth of the responsible person to be added to the Disqualified Persons Register.

10. Definition of ‘government entity’ in the Charities Act 2013

Introduction

- 10.1 To be entitled to registration as a charity, an entity must meet the definition of charity in the Charities Act.
- 10.2 The definition of charity in section 5 of the Charities Act provides that a ‘charity’ cannot be a ‘government entity’.
- 10.3 ‘Government entity’ is defined in s 4 (1) of the Charities Act as follows:
- government entity** means
- (a) a government entity (within the meaning of the A New Tax System (Australian Business Number) Act 1999) (the ABN Act); or
 - (b) an entity:
 - (i) established under a law by a State or Territory; and
 - (ii) of a kind prescribed under subsection (2); or
 - (iii) a foreign government agency (within the meaning of the Income Tax Assessment Act 1997).
- 10.4 Section 41 of the ABN Act defines ‘government entity’ as including:
- (a) A Department of State of the Commonwealth;
 - (b) A Department of the Parliament established under the Parliamentary Service Act 1999 (Cth);
 - (c) An Executive Agency, or Statutory Agency, within the meaning of the Public Service Act 1999 (Cth); and
 - (d) A Department of State of a State or Territory.¹¹¹
- 10.5 Section 3 of the *Charities (Definition of Government Entity) Instrument 2013* (Cth) (the Legislative Instrument) prescribes four entities for the purposes of s 4(1)(b)(ii) of the Charities Act:
- (a) a local governing body (within the meaning of the *Income Tax Assessment Act 1997*);
 - (b) an entity that has all the privileges and immunities of the Crown (in any of its capacities);
 - (c) an entity, where an individual who occupies a position within that entity holds an office of profit under the Crown (in any of its capacities);
 - (d) an entity that, in pursuing its objectives, is not independent of the Crown (in any of its capacities), having regard to:

¹¹¹ There is a fifth type of ‘government entity’ under the ABN Act that relates to organisations that are not entities and is therefore not relevant for the purposes of the definition of charity.

- (i) the degree of control the Crown can exercise over the entity's governance and operations; and
- (ii) whether the entity was established with the objective of fulfilling a function or responsibility of the Crown (in any of its capacities); and
- (iii) any other relevant matter.

10.6 The definition does not reflect the relevant common law principles in this area. The ACNC has found the definition difficult to interpret and apply in practice. This lack of certainty has significant implications for entities created by or under statute that seek to determine whether they are entitled to charity registration.

Recommendation 40

Consider whether the definition of 'government entity' in the Charities Act should be amended to increase clarity, certainty and internal consistency.

Appendix

Regulatory pyramid of support and compliance

