

The Hon. Michael Sukkar MP
Assistant Minister to the Treasurer
The Treasury
Langton Crescent
Parkes ACT 2600

By electronic submission to the Review Secretariat website

Dear Sir,

REVIEW OF AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION LEGISLATION

Introduction

1. We are pleased to provide these comments to the *Review Secretariat* in respect of the review of the *Australian Charities and Not-for-profits Commission Act 2012* ("Act"), as required by the terms of reference announced by you on 20 December 2017. We are pleased that this marks the second occasion we have had to respond to a review of this Act.
2. By way of background, Hanrick Curran is a firm of Chartered Accountants who provide audit, tax and other services to various not-for-profit ("NFP") entities in the South-East Queensland region.
3. Our clients typically meet the definition of a large charity included in the Act and are usually either companies limited by guarantee under the *Corporations Act 2001* or are incorporated associations regulated under the relevant Queensland legislation (e.g., *Associations Incorporation Act 1981 (Qld)*, *Collections Act 1966 Qld*, *Charitable Funds Act 1958 (Qld)*, and *Charitable and Non-Profit Gaming Act 1999 (Qld)*). Our comments included herein are formed on the basis of our experience with our current and former clients.

General Comments

4. The NFP sector is a crucial element of Australian society and our economy, providing benefits and resources to the most disadvantaged people in our society and helping to ensure the character of Australian society. In this regard, the work of the ACNC is central to the maintenance of public trust and confidence in the NFP sector.
5. We consider that the position of the ACNC should continue to be supported by the Government and that the ACNC be resourced sufficiently so that it can execute its mission.
6. We note the quality of output from the ACNC in providing resources to the NFP sector for matters such as governance frameworks and fraud prevention

arrangements. We consider that this provides evidence of the efficient and effective work performed by the ACNC since its inception and that the ACNC has developed to properly fulfil its role as a specialist regulator. We further consider that a specialist regulator is likely to continue to provide significant opportunities for micro-economic reform in regulation of the NFP sector and that over the medium term we have already seen a realisation of these benefits via improved governance and reporting in the NFP sector.

7. We consider that the amalgamation of charity registration and the granting of status as a deductible gift recipient into the control of the ACNC has been a beneficial element of the introduction of the Act.
8. The possibility of the extension of the ACNC regulatory framework to entities in the NFP sector, other than just registered charities, provides a further opportunity for coordination of government reporting and reduction in red tape. However, we remain concerned that the volume of regulation required to conduct a fundraising campaign is already significant in Queensland and that without commensurate reduction in state based legislation, the extension of the Act to NFP entities that are not registered charities will increase the already onerous regulatory environment for the NFP sector.
9. We consider that any regulation in this space must have regard to the limited professional and compliance resources that are available to entities in the NFP sector and the already considerable donations of time and effort¹ made to these entities by the community. We would not like to see a situation where entities are unable to operate for social benefit, simply because they do not have, and cannot access, resources to address legislative and regulatory compliance.
10. We favour regulation that is necessary to respond to known weaknesses in the NFP sector and which is minimal, appropriate and principles based.
11. We consider that the current regulatory framework is reasonable and appropriate for the purpose of the objectives of the Act, in short, the Act does not require significant amendments in our opinion. However, we consider that there exist opportunities for continued improvement as set out in this response.

ASIC and ACNC regulation

12. We note that many of our clients continue to be regulated by both the Australian Charities and Not-for-profits Commission ("ACNC") and the Australian Securities and Investments Commission ("ASIC").
13. This regulation occurs where a charity, which is a company limited by guarantee, is regulated by the ACNC. Section 111L of the *Corporations Act 2001* provides an

¹ In a 2016 survey by Chartered Accountants ANZ, the survey identified that Chartered Accounts provided over 40,000 days in support of NFP organisations in 2015, averaging 3 hours a week volunteering or working pro-bono. (Refer: <https://www.charteredaccountantsanz.com/news-and-analysis/news/ca-support-for-nfp-groups-revealed>)

exemption from certain sections of the *Corporations Act 2001* for those companies that are charities regulated by the Act.

14. Unfortunately, this means that in many instances, a charity will have compliance issues that span both Acts (e.g., in dealing with meetings of members, where legislative rules and guidance must be drawn from both "*Chapter 2G – Meetings*" in the *Corporations Act 2001* and the "*Governance Standards*" established under Chapter 3 of the Act).
15. We understand that charities also experience issues with this dual regulation in areas such as identification of directors and officers between the ASIC databases and the ACNC databases, and in dealing with changes in year-end of companies limited by guarantee that are ACNC regulated.
16. We consider that this duplication in regulation represents further opportunity for the rationalisation of regulation and red tape, however, we acknowledge that this is a large task that requires more consideration than is appropriate in this response².

Omissions from the current regulatory framework (1)

17. In the context of the dual regulation noted at [12], we consider that the Act does not adequately provide for the reporting of information to the ACNC by Registered Company Auditors.
18. Under the *Corporations Act 2001*, Registered Company Auditors have an obligation to report certain breaches of legislation to ASIC. These reporting requirements are set out in s.311 and are in the public interest by requiring that significant contraventions of the *Corporations Act 2001* are reported to the regulator, being ASIC.
19. Section 311 of the *Corporations Act 2001* is contained within Part 2M.3 of the *Corporations Act 2001* and Part 2M.3 of the legislation is not applicable to charities regulated by the ACNC because of the exemption provided by s.111L of the *Corporations Act 2001*. This results in a gap in the ability of Registered Company Auditors to report significant breaches of the Act to the ACNC³.
20. We consider that it would be in the public interest for the Act to be amended to include a section with similar operation to s.311 of the *Corporations Act 2001*.

² We submit that a potential method of dealing with the complex interaction between the Act and the *Corporations Act 2001* might be to deal with charities in the same manner as "Registered Organisations" under the Fair Work legislation. This approach may result in the creation of a new type of body corporate, being a "Registered Charity" and that when a company limited by guarantee becomes a "Registered Charity" it is then exempted from the entirety of the *Corporations Act 2001* and subject only to regulation under the ACNC Act. Such an approach would likely require significant additional regulation to be included in the Act, including to deal with matters such as how a "Registered Charity" is dissolved and how to deal with the insolvency of a "Registered Charity".

³ Notwithstanding the requirements for reporting legislative breaches to a regulator which are included in APES 110 *Code of Ethics for Professional Accountants*.

Omissions from the current regulatory framework (2)

21. The *Corporations Act 2001* provides for process for the changing of year-ends by companies in Part 2M.3 (which is not applicable to ACNC regulated entities).
22. The Act provides that each entity will have a 30 June year end, unless approved by the ACNC⁴. We consider that it would be beneficial to the efficient operations of the sector for all charities to have access to an ability to change their year-end in a manner similar to that included in the *Corporations Act 2001*, and which is dealt with by the entity without reference to the ACNC.

Financial reporting requirements in the Regulations

23. The Act and the *Australian Charities and Not-for-profits Commission Regulation 2013* ("Regulations") contain various requirements for financial reporting of charities regulated by the ACNC, particularly set out in Division 60.
24. We consider that the mandating of financial reporting standards in the Regulations is not efficient regulation and places an unnecessary regulatory burden on charities.
25. Efficiency of regulation is degraded through the use of prescriptive requirements in the Regulation. For example, the Regulation at 60.30(2) currently refers to AASB 1031 *Materiality*, whereas, that accounting standard has been withdrawn by the Australian Accounting Standards Board⁵.
26. We recommend removal of the prescriptive accounting standard requirements and replacement of these elements of the Regulation with principle based requirements.
27. We continue to support the inclusion of the ability of charities to provide special purpose financial reports to the ACNC and their other stakeholders. Section 60.30 of the Regulation enables charities, that are not reporting entities, to provide their stakeholders and the ACNC with a special purpose financial report.
28. Special purpose financial reports include the basic elements of a full financial report, such as an income statement, balance sheet, equity statement, cash flow statement⁶, and accounting policy notes. We consider that in a large majority of cases, these four primary financial statements provide the user of the statements with sufficient information on which they can base resource allocation decisions. We consider that the majority of additional notes required for a general purpose financial report are unnecessary for the majority of charities.

⁴ Refer s.60-85 of the Act.

⁵ Superseded for periods beginning after 1 July 2015, refer AASB website [here](#).

⁶ Properly named under accounting standards as the "Statement of Profit or Loss and Other Comprehensive Income", the "Statement of Financial Position", the "Statement of Changes in Equity", and the "Statement of Cash Flows" (refer AASB 101 *Presentation of Financial Statements*).

29. We reiterate our continued support for the inclusion of special purpose financial reporting for charities.

Interaction with state and federal government reporting

30. We note that certain of our clients continue to have dual reporting requirements with state government reporting. These cases are typically in respect of specific fundraising activities (e.g., an art union and similar activities) that are regulated by specific legislation.
31. The specific legislation in Queensland that affects charities running these additional activities was identified in [3].
32. We appreciate the complexity of regulating charities that engage in gaming activities for the purpose of fundraising and consider that additional state based reporting for these activities is reasonable.
33. However, we also note that the implementation of the Act has yet to eliminate duplicate reporting with the Department of Education and Training in respect of acquittal of school grants. We consider that there are potential micro-economic reform opportunities in the reduction of red-tape for ACNC registered charities that operate schools which receive federal funding from the Department of Education and Training.

Representation and governance requirements

34. The *Governance Standards* include two requirements in respect of "Purpose and not-for-profit nature of a registered entity"⁷ and "Accountability to members"⁸.
35. We consider that these requirements are fundamental to the good governance of the charity sector and instrumental in enabling the ACNC to fulfil its objectives, as set out in s.15.5 of the Act.
36. During our time as auditors and advisors to the NFP sector, we have developed a concern for the potential for charities to be alienated from their member base, or for their member base to be so narrowed as to be an ineffective representation of the beneficiaries that the charity is established to serve. This alienation can occur for any number of reasons and, based on concepts of agency theory⁹, can result in charities losing accountability to stakeholders.
37. Considering our comments above, we recommend that the review of the Act and objectives of the ACNC should consider how the representative nature of the NFP sector can be maintained and broadened. For example, would it be appropriate or practical to have minimum member numbers for registered charities? We note

⁷ Refer s.45.5 of the Regulation.

⁸ Refer s.45.10 of the Regulation.

⁹ Refer <https://www.investopedia.com/terms/a/agencytheory.asp>

the submission to the *Review Secretariat* by the ACNC and recommendation 7 therein, which addresses a similar concern.

38. We foresee potential significant problems with mandated requirements for minimum numbers of members or responsible persons but consider that the issue of representation and governance should be included in the review of the Act by the *Review Secretariat*.
39. We also question whether setting the minimum number of responsible persons (or members) at three (3) is appropriate in the context of the NFP sector. Whilst this might cause some charities some difficulty, we would generally support a higher number when it comes to setting the minimum number of members or responsible persons.
40. We note the submission by the ACNC regarding the expansion of its objectives as set out in the Act (addressed below). We consider that any consideration of the objectives of the ACNC should consider the member representation requirement and the implementation of the *Governance Standards* noted at [34].

Objects of the Act and the objectives of the ACNC

41. We note the submission by the ACNC regarding the expansion of its objectives as set out in the Act. Specifically, the ACNC has recommended the expansion of its objectives to include:
 - a. “promote the effective use of resources”, and
 - b. “enhance accountability of not-for-profit entities to donors, beneficiaries and the public”.
42. The expansion of the objectives of the ACNC to include these items is *prima facie* reasonable, however, we question the ability of the ACNC to determine what is ‘effective’.
43. The determination of ‘effective’ in the context of meeting the purpose of an organisation appears to be a qualitative consideration. We further question the wisdom of centralising the determination of what is ‘effective’ in one organisation (i.e., the ACNC) and consider that this is a determination best left to the collective wisdom of the broader stakeholders of charities.
44. Whilst we are concerned with the additional objective set out at [41.a], in the absence of any other changes to the Act that might constitute regulatory overreach, the promotion of effectiveness in the NFP sector remains, *prima facie*, a worthwhile objective.

Enforcement activity by the ACNC

45. The activity of the ACNC since its inception in 2012 has, in our opinion, had a generally positive influence on the operation of the charity sector in Australia. This positive impact has supported the objectives of the ACNC as currently stated.

46. We note the numerous instances where the charity regulator has taken action against charities for various compliance and regulatory issues¹⁰. These regulatory actions have taken place in the context of the current objects and powers of the ACNC.
47. We submit that the ACNC currently has sufficient regulatory ability enshrined in the *Governance Standards* and Regulation and that improvements to the enforcement of the extant regulation should be considered as an alternative to the creation of additional regulation.

Summary Conclusion

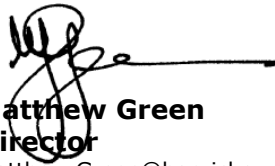
48. The Act has substantially benefitted the NFP sector, but retains opportunities for improvement, particularly in the complicated interaction that arises with the *Corporations Act 2001*. Careful and prudent reform of the interaction of these two acts should be pursued. We consider that the *Corporations Act 2001* developed from earlier legislation over a long period and provides a sound and comprehensive basis for the regulation of bodies corporate. We submit that the *Review Secretariat*, and the Parliament, should have careful consideration of the contents of the *Corporations Act 2001* as a guide to any amendment to the ACNC Act (e.g., as regards to the appointment and removal of auditors).
49. The prescriptive requirements for financial reporting that are contained in the Regulations should be removed and replaced by principles based requirements, thereby reducing the amount of legislative red-tape and providing charities with an opportunity to apply Australian Accounting Standards and generally accepted accounting principles in Australia, rather than the prescriptive requirements of the Regulation.
50. Opportunities for the streamlining of financial reporting, the “report once, use often” concept, to multiple government entities should continue to be pursued (e.g., reporting of schools to the ACNC and the Department of Education and Training).
51. Representation and governance requirements should be assessed by the *Review Secretariat*, including assessing minimum member and responsible entity requirements in the Act.
52. Objectives of the Act, as currently stated, appear reasonable but may warrant expansion, provided that any accompanying regulation is considered and prudent.
53. Enforcement activity by the ACNC has been appropriate and the Act appears to provide adequate ability for the ACNC to undertake enforcement activity. Any changes to the enforcement powers in the Act should be carefully considered. The ACNC should continue to receive appropriate resourcing to enable the adequate completion of enforcement activities.

¹⁰ Refer https://acnc.gov.au/ACNC/Pblctns/Media_centre/Med_Rel/ACNC/Comms/MedRel.aspx

We are very pleased to have been able to make this submission to the *Review Secretariat*. If you have any queries in relation to our submission, please contact me directly on 0447 724 595.

Yours sincerely

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