



STRENGTHENING FOR PURPOSE:
AUSTRALIAN CHARITIES AND
NOT-FOR-PROFITS COMMISSION
Legislation Review 2018

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**Strengthening for Purpose:
Australian Charities and
Not-for-profits Commission
Legislation Review**

Report and Recommendations

The Hon Michael Sukkar MP
Assistant Minister to the Treasurer
Parliament House
Canberra ACT 2600

31 May 2018

Dear Minister

In accordance with the Terms of Reference, we are pleased to present our report 'Strengthening for Purpose: The Australian Charities and Not-for-profits Commission Legislation Review.'

Australia needs a vibrant and innovative charities and not-for-profits sector. The Panel was conscious of the need to find a balance between supporting the sector, reducing red tape, enhancing accountability and addressing misconduct.

The Panel endeavoured to hear as many voices as possible in the time available and met with stakeholders in consultations and roundtables across Australia. A number of themes emerged in the consultations and written submissions and these are addressed in this Report.

The Report has four parts. Part A addresses objects, functions and powers. Part B covers the regulatory framework and includes governance, reporting, basic religious charities, secrecy, advocacy, criminal misconduct and beyond charities. Part C relates to red tape reduction and includes fundraising, one-stop-shop and the need for a national scheme. Part D provides additional legislative amendments.

The Panel commends this Report and its recommendations to you.

Yours faithfully



Patrick McClure AO
Chair



Greg Hammond OAM
Member



Su McCluskey
Member



Dr Matthew Turnour
Member

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PREFACE

On 20 December 2017, the Assistant Minister to the Treasurer, the Hon Michael Sukkar MP, announced the review 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) (ACNC Acts). The Terms of Reference are set out in Appendix A.

Mr Patrick McClure AO was appointed to chair the Review Panel (Panel), which included Mr Greg Hammond OAM, Ms Su McCluskey and Dr Matthew Turnour.

This Report satisfies the statutory requirement to undertake a review after the first five years of operation of the ACNC Acts.

The Terms of Reference require the Panel:

1. to examine the extent to which the objects of the ACNC Acts continue to be relevant;
2. to assess the effectiveness of the provisions and the regulatory framework established by the ACNC Acts to achieve the objects;
3. to consider whether the powers and the functions of the Commissioner of the Australian Charities and Not-for-profits Commission (Commissioner) are sufficient to enable these objects to be met; and
4. to consider whether any amendments to the ACNC Acts are required to enable the achievement of the objects and to equip the Commissioner to respond to both known and emerging issues.

The Panel would like to express its appreciation to the individuals and organisations who contributed their time, expertise and insights to the Review. The Panel received 172 submissions¹ and met with 215 stakeholders in consultations and roundtables (see Appendices C and D). Those consulted included international, national and State regulators, experts in law, accounting, fundraising and other disciplines. The Panel took counsel from leading academics, service providers and consulted with the Religious Freedoms Review and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) review team on overlapping issues. The Panel also consulted with Commonwealth and State Members of Parliament.

In summary, the Panel has endeavoured to listen to as many voices as possible in the time available and have reported on the issues for the Commonwealth Parliament as a whole.

While the Terms of Reference framed the Panel's deliberations, they are general in nature and focused on the future. The submissions and consultations exposed key themes that arose consistently and these have guided the Panel's choice of the issues addressed, and the chapters in this Report.

The Panel makes recommendations for action that may be taken in the short to medium term to address the challenges and concerns emerging for the sector. However, in the long term, there is a need for a national scheme based on a referral of powers by the States to the Commonwealth. Just as it took time for the national schemes relating to corporations and consumer protection laws to evolve, it may take time for a national scheme for charities and not-for-profits to develop.

The Panel acknowledges and thanks the staff from PricewaterhouseCoopers who acted as the Review secretariat.

¹ This includes confidential and supplementary submissions.

GLOSSARY

AASB	Australian Accounting Standards Board
AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
accounting standards	has the same meaning as in the ACNC Act
ACFID	Australian Council for International Development
ACIC	Australian Criminal Intelligence Commission
ACL	Australian Consumer Law
ACNC	Australian Charities and Not-for-profits Commission
ACNC (C&T) Act	<i>Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012</i>
ACNC (C&T) Bill	Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 (first reading) as introduced in the House of Representatives on 23 August 2012
ACNC Act	<i>Australian Charities and Not-for-profits Commission Act 2012 (Cth)</i>
ACNC Acts	ACNC Act and ACNC (C&T) Act
ACNC Bill	Australian Charities and Not-for-profits Commission Bill 2012 (first reading) as introduced in the House of Representatives on 23 August 2012
ACNC Regulation	<i>Australian Charities and Not-for-profits Commission Regulation 2013</i>
Advisory Board	ACNC Advisory Board
AFP	Australian Federal Police
AICD	Australian Institute of Company Directors
AIS	Annual Information Statement
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
Assistant Commissioners	Assistant Commissioners of the ACNC

Associations Incorporations Act	<i>Associations Incorporations Act 1985 (SA)</i>
ATO	Australian Taxation Office
ATOID	ATO Interpretive Decision
AUASB	Auditing and Assurance Standards Board
auditing standard	has the same meaning as in the ACNC Act
AUSTRAC	Australian Transaction Reports and Analysis Centre
BRC	basic religious charity (as defined in section 205-15 of the ACNC Act)
CAANZ	Consumer Affairs Australia and New Zealand
CA ANZ	Chartered Accountants Australia and New Zealand
CCEW	Charity Commission for England and Wales
CDC	Consumer Directed Care
CGRGs	Commonwealth Grants Rules and Guidelines 2017
Charities Act	<i>Charities Act 2013 (Cth)</i>
Charities Bill	Charities Bill 2013 (first reading) as introduced to the House of Representatives 29 May 2013
Charity Passport	the ACNC's online service which enables authorised government agencies to access ACNC data via a file transfer protocol process
Charity Portal	the ACNC's online service which allows registered entities to (amongst other things) update their details with the ACNC and submit their AIS
CMASC	Christian Ministry Advancement - Standards Council
COAG	Council of Australian Governments
collective reporting	reporting where the Commissioner allows a reporting group to prepare and lodge one or more AIS and, where required, one or more financial reports on a basis other than an entity basis
Commissioner	Commissioner of the ACNC
Commonwealth Parliament	Parliament of the Commonwealth of Australia
Competition and Consumer Act	<i>Competition and Consumer Act 2010 (Cth)</i>
Corporations Act	<i>Corporations Act 2001 (Cth)</i>

COSS	Councils of Social Service Network
Criminal Code	<i>Criminal Code Act 1995 (Cth)</i>
DFAT	Department of Foreign Affairs and Trade
DGR	Deductible Gift Recipient
ECS	external conduct standards within the meaning of the ACNC Act
Electoral Funding and Disclosure Reform Bill	Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (first reading) as introduced in the Senate on 7 December 2017
FATF	Financial Action Task Force
FIA	Fundraising Institute of Australia
FOI Act	<i>Freedom of Information Act 1982 (Cth)</i>
FRE	federally regulated entity (as defined in section 205-15 of the ACNC Act)
governance standards	the governance standards prescribed in Division 45 of the ACNC Regulations
GST	Goods and Services Tax
HPC	health promotion charity
IASB	International Accounting Standards Board
ICCPR	International Covenant on Civil and Political Rights
ITAA 1936	<i>Income Tax Assessment Act 1936 (Cth)</i>
ITAA 1997	<i>Income Tax Assessment Act 1997 (Cth)</i>
joint reporting	reporting where the Commissioner allows a reporting group to prepare and lodge a single AIS (for small registered entities) or a single AIS and a single financial report (for medium and large registered entities) for the group for a financial year
LCA	Law Council of Australia
MHA	Mental Health Australia
NDIS	National Disability Insurance Scheme
NFP	not-for-profit
OECD	Organization for Economic Co-operation and Development

PAF	Private Ancillary Fund
Panel	the Panel appointed to undertake the Review
PBI	public benevolent institution
Productivity Commission Report	Productivity Commission Research Report, <i>Contribution of the Not-for-Profit Sector</i> , 2010
PUG	ACNC Professional Users Group
QLS	Queensland Law Society
RASA	Relationships Australia South Australia
Register	ACNC Register
Registered Charity Tick	ACNC Tick of Charity Registration
registered entity	has the same meaning as in the ACNC Act
Religious Freedom Review	Religious Freedom Review established by the Prime Minister on 22 November 2017 to examine whether Australian law adequately protects the human right to freedom of religion
reporting group	means two or more registered entities grouped under subsection 60-95(4) of the ACNC Act
responsible person	has the same meaning as ‘responsible entity’ in the ACNC Act
Review	the review of the ACNC Acts addressed in this Report
Revised Explanatory Memorandum	Revised Explanatory Memorandum, ACNC Bill and the ACNC (C&T) Bill which accompanied and explained the amended version (third reading) of the ACNC Bill and the ACNC (C&T) Bill
sector	Australian charities and not-for-profits sector, also referred to as the third sector, for purpose sector or community sector
SES	Senior Executive Service
SUG	ACNC Sector Users Group
Terms of Reference	the Terms of Reference set out in Appendix A
UDHR	Universal Declaration of Human Rights

EXECUTIVE SUMMARY

The charities and not-for-profits sector (sector) in Australia is large, diverse and provides many services to the community. In recent decades it has also experienced major opportunities and disruptions including the outsourcing by governments of human services, competition for contracts from commercial companies, the development of outcomes measurement of services, introduction of consumer directed care services, new forms of online fundraising and the use of new technologies.

In evaluating the effectiveness 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) (ACNC Acts), the Panel was conscious of the need to find a balance between red tape reduction, supporting a vibrant, innovative sector and public expectations of transparency, accountability and good governance. These expectations have been highlighted in royal commissions and other inquiries and a small number of high profile cases of misconduct.

There is strong support for the Australian Charities and Not-for-profits Commission (ACNC) and its accomplishments in the first five years, with the sector acknowledging the collaborative and educative approach taken by the ACNC. The Panel considers this approach should continue and there is an opportunity to broaden the use of incentives to encourage good behaviour and use powers available to enforce the law in matters of misconduct.

The Report makes 30 recommendations. Among the recommendations and conclusions, a common theme is the need for a national scheme for the sector, requiring a referral of powers from the States to the Commonwealth.

Australia currently has eight separate jurisdictions whose regulatory regimes impact upon charities and not-for-profits, with the Commonwealth Government's regulatory requirements, through the ACNC Acts and the tax system, overlaying each of these. This results in inconsistency, complexity and inefficiency for charities. The Panel is strongly of the view that a national scheme is the best option for the sector going forward, especially in areas such as governance, fundraising and registration. In the absence of a national scheme, the sector will continue to be subject to an unacceptable level of unnecessary red tape.

While the Panel has recommended the long term goal of moving towards a national scheme, it has also made recommendations to address issues in the short term that have been identified.

The Report has been divided into four parts: Part A covers objects, functions and powers, Part B addresses the regulatory framework, Part C outlines red tape reduction and Part D contains additional legislative amendments.

Part A – Objects, Functions and Powers

Objects

In examining the extent to which the objects of the ACNC Act continue to be relevant, submissions and consultations focussed on the ACNC's proposed additional objects. The Panel considered the range of opinions expressed and concluded that the objects in the ACNC Act continue to be relevant and it is unnecessary for the objects to be either expanded or prioritised.

Functions

The ACNC Act should clearly articulate the functions of the Commissioner and those functions should align with each object. The Panel recommends inserting functions and duties into the ACNC Act.

The ACNC's education and research function is highly valuable and should continue to be a priority.

Powers

The ACNC Act should be amended to replace the term ‘responsible entity’ with ‘responsible person’. This will make the ACNC Act simpler and clearer and will ensure that the ACNC Act and ACNC guidance are consistent.

The Panel considers that the Commissioner’s powers are adequate and do not need to be increased. In relation to federally regulated entities (FREs), the powers of the Commissioner should not be any more than those of regulators overseeing other entities. In this regard, the Panel recommends the removal of the Commissioner’s powers to replace responsible persons of a registered entity, and be replaced with the Commissioner only having the powers of comparable regulators.

Best practice internal governance for the ACNC would be to establish an Executive Committee, comprising the Commissioner and the Assistant Commissioners. The Commissioner should also be able to delegate powers more broadly to ACNC staff.

Advisory Board

The role of the Advisory Board should be extended to interface with both the Minister and the sector. This will enable the Advisory Board to engage directly with the sector and provide the Minister with an independent perspective on issues.

Part B – Regulatory Framework

Governance

In respect of the ACNC governance standards, the Panel recommends no changes to Standards 1, 2 and 4. In respect of Standard 3, the Panel recommends that this be repealed. The Panel also recommends that Standard 5 be retained, but the Regulation be amended to remove the word ‘perceived’ with respect to conflicts of interest.

To reduce red tape, the Panel recommends that a registered entity should be presumed to be in compliance with ACNC governance standards if it already applies a separate set of comparable governance requirements. The registered entity should be able to self-assess that it is compliant with such governance requirements and make a declaration in the Annual Information Statement (AIS).

Director’s duties and other provisions ‘turned off’ under the *Corporations Act 2001* (Cth) (Corporations Act) should be ‘turned on’. This will resolve ambiguity and address other concerns raised in the course of the Review.

Reporting and Proportionality

The current revenue thresholds for determining a registered entity’s size, and the minimum reporting requirements for registered entities, are too low and have led to an increase in red tape for some registered entities.

The Panel recommends that the revenue thresholds be increased to less than \$1 million for a small registered entity, from \$1 million to less than \$5 million for a medium registered entity and \$5 million or more for a large registered entity, and determined on rolling three-year revenue.

Some changes are required to the minimum reporting requirements. These include:

- small registered entities continue to provide an AIS (including basic financial information) and have the option to provide either a simplified balance sheet or a statement of resources;
- medium registered entities continue to provide an AIS to the ACNC and reviewed or audited annual financial statements; and
- large registered entities continue to provide an AIS to the ACNC and audited annual financial statements.

The revised thresholds and minimum reporting requirements should take effect from 1 July 2019.

The Panel also recommends greater disclosure of related party transactions and remuneration practices to improve public trust and confidence in the sector. The disclosure of remuneration practices should only be required of large registered entities.

Basic Religious Charities

If the changes to the financial reporting requirements outlined above are adopted, then this would improve transparency and would not result in the imposition of onerous requirements for basic religious charities (BRCs) if there was no exemption.

The exemptions from governance standards and the powers of the Commissioner to replace responsible persons are matters of significant concern to established religious denominations.

If the recommendations:

- to remove the powers of the Commissioner to replace a responsible person; and
- a registered entity be presumed to comply with the ACNC governance standards if it already complies with comparable governance requirements,

were adopted, then all the BRCs exemptions should be reviewed.

If all the relevant changes recommended by the Panel are not adopted, or if only the relevant changes relating to the financial reporting requirements were to be adopted, then the Panel considers that the exemptions for BRCs should be maintained.

Secrecy

The secrecy provisions of the ACNC Act are overly restrictive and should be amended to allow the Commissioner to disclose information in a wider range of circumstances, including to protect public trust and confidence in the sector. The ACNC's inability to make any comment in respect of whether it is (or is not) undertaking an investigation in respect of a complaint against a registered entity is harmful to the perception of the ACNC as an effective regulator.

Further, the Commissioner should be authorised to collect the personal details of responsible persons involved in unlawful activity.

Advocacy

The Panel supports the role of charities in advocacy to promote or oppose changes to any matter of law, policy or practice that is linked to their charitable purpose. However, there is ambiguity around the threshold between issues-based advocacy linked to a charitable purpose and political advocacy that may constitute a disqualifying purpose. The Panel considers that the Commissioner must be resourced to enforce the law to prevent the misapplication of resources for activities that would equate to disqualifying purposes.

The Panel concludes that there should be resourcing to enable appropriate test cases to be conducted to clarify the law on advocacy and other areas of public interest.

Criminal Misconduct

The Australian Criminal Intelligence Commission (ACIC) advised of a small number of registered entities of interest with links to terrorism-related activities as well as a number of responsible persons who are members of organised crime groups with suspected involvement in criminal offences.

There is a need for the ACNC to work with the ACIC, the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Australian Federal Police (AFP) and other Commonwealth departments and agencies to develop a regulatory model for high-risk registered entities based on specific risk indicators.

The ACNC should be resourced to enhance its access to criminal intelligence databases, use of secondments and information sharing with the ACIC and other agencies.

The Panel recommends that the ACNC Regulations be amended to disqualify a person from being a responsible person if they have a conviction for terrorism, terrorism financing, money laundering, fraud, importation or distribution of illicit drugs or a child sexual offence under Commonwealth, State or Territory law.

Beyond Charities

The ACNC regulatory framework could be extended beyond charities to include some not-for-profits. The Panel takes the view that risk, based on revenue, should be used to decide which entities should be migrated first. Based on information from the ATO, the Panel considers it appropriate to migrate a small number of income tax exempt not-for-profits with annual revenue of \$5 million or more to the ACNC Register.

Part C – Red Tape Reduction

Fundraising

The Commonwealth Government has an opportunity to reduce red tape for the sector by taking a leadership role in working with State and Territory Governments to harmonise fundraising laws. By amending the Australian Consumer Law (ACL) to ensure application to fundraising activities, working with the States and Territories to repeal or amend existing fundraising laws, and developing a mandatory Code of Conduct, the Commonwealth can significantly reduce the administrative burden on the sector.

Both Victoria and New South Wales have indicated support for national reform on fundraising and the ACNC has made some progress with ACT, South Australia and Tasmania.

One-stop-shop

To reduce red tape for the sector, the Commonwealth Government should mandate that departments and agencies are required to use the Charity Passport and must not seek information from registered entities that is already available through the Charity Passport.

The Panel recommends that all responsibility for the incorporation and regulation of companies which are registered entities, be transferred from ASIC to the ACNC, except for criminal offences. This will significantly reduce the level of red tape that is currently imposed on entities that are on both registers.

Part D - Additional Amendments

The Panel recommends that all issues related to the ACNC should be consolidated into one Act. The Panel further recommends that the interaction of the ACNC Act and the Corporations Act should be reviewed.

In the course of this Review the Panel has become increasingly aware of the dynamic and evolving nature of the sector and the need for the regulatory environment to remain under review. The Parliament mandated a five year review in the legislation and the Panel recommends ongoing five year reviews.

Recommendations

All the recommendations made by the Panel are set out on the following three pages.

RECOMMENDATIONS

Part A – Objects, Functions and Powers

Chapter 1 – Objects

1. The objects in the *Australian Charities and Not-for-profit Commission Act 2012* (Cth) not be changed.

Chapter 2 – Functions

2. The ACNC Act be amended to include functions and duties that align with the objects.
3. The ACNC should continue to prioritise its education and research functions, including the use of behavioural insights and incentives.

Chapter 3 – Powers

4. The ACNC Act be amended to replace the term ‘responsible entity’ with ‘responsible person’.
5. The powers of the Commissioner to replace a responsible person be removed.
6. An Executive Committee comprising the Commissioner and the Assistant Commissioners be established to be responsible for the strategic direction and performance of the ACNC.
7. The ACNC Act be amended to give the Commissioner broader powers to delegate functions or powers to staff.

Chapter 4 – Advisory Board

8. The Advisory Board be empowered to provide advice to the Minister or the Commissioner on its own initiative and engage directly with the sector.

Part B – Regulatory Framework

Chapter 5 – Governance

9. ACNC governance standard 3 be repealed and governance standard 5 amended to remove the word ‘perceived’ with a view to consistency with the Corporations Act.
10. A registered entity be presumed to comply with the ACNC governance standards if it already complies with other comparable governance requirements.
11. The *Corporations Act 2001* (Cth) be amended to ‘turn on’ the duties and other provisions previously ‘turned off’.

Chapter 6 – Reporting and Proportionality

12. Registered entities be required to report based on size, determined on rolling three-year revenue, with thresholds of less than \$1 million for a small entity, from \$1 million to less than \$5 million for a medium entity and \$5 million or more for a large entity.
13. Minimum reporting requirements for small registered entities be amended to allow in an Annual Information Statement (AIS) an option to provide a simplified balance sheet or a statement of resources.
14. Registered entities be required to disclose related party transactions.
15. Large registered entities be required to disclose the remuneration paid to responsible persons and senior executives on an aggregated basis.

Chapter 7 – Basic Religious Charities

16. If recommendations 12 and 13 are adopted, the necessity for the exemption from financial reporting for basic religious charities be reviewed, and if recommendations 5 and 10 are also adopted, all exemptions for basic religious charities be reviewed.

Chapter 8 – Secrecy

17. The Commissioner be given a discretion to disclose information about regulatory activities (including investigations) when it is necessary to protect public trust and confidence in the sector.
18. The Commissioner be authorised to collect the personal details of responsible persons involved in unlawful activity.

Chapter 9 – Advocacy

19. The ACNC be resourced to enable the Commissioner to enforce and develop the law where registered entities engage in disqualifying purposes (within the meaning of the *Charities Act 2013* (Cth)).
20. Test case funding be made available to develop the law in matters of public interest, including disqualifying purposes.

Chapter 10 – Criminal Misconduct

21. ACNC's regulatory approach to high-risk registered entities be further developed in partnership with the Australian Criminal Intelligence Commission (ACIC), the Australian Transactions Reports and Analysis Centre (AUSTRAC) and other Commonwealth departments and agencies.
22. The ACNC be resourced to enhance its access to criminal intelligence databases, use of secondments and information sharing with the ACIC and other agencies.
23. The *Australian Charities and Not-for-profit Commission Regulations 2013* (Cth) be changed to disqualify a person from being a responsible person if they have a conviction for terrorism, terrorism financing, money laundering, fraud, importation or distribution of illicit drugs or a child sexual offence under Commonwealth, State or Territory law.

Chapter 11 – Beyond charities

24. The ACNC Act be amended to provide that certain not-for-profits with annual revenue of \$5 million or more must be registered under the ACNC Act to be exempt from income tax and access Commonwealth tax concessions.

Part C – Red Tape Reduction

Chapter 12 – Fundraising

25. The Australian Consumer Law be amended to clarify its application to charitable and not-for-profit fundraising and a mandatory Code of Conduct be developed.

Chapter 13 – One-Stop-Shop

26. The use of the Charity Passport by Commonwealth departments and agencies be mandated.
27. Responsibility for the incorporation and all aspects of the regulation of companies which are registered entities be transferred from the Australian Securities and Investments Commission (ASIC) to the ACNC, except for criminal offences.

Chapter 14 – A National Scheme

28. A single national scheme for charities and not-for-profits be developed.

Part D – Additional Amendments

Chapter 15 – Legislative Amendments

29. Review the interface between the ACNC Act and the Corporations Act and consider the additional amendments set out in Appendix B.
30. The ACNC Acts be consolidated and there be ongoing five year reviews.

INTRODUCTION

Contribution of the sector

Charities and not-for-profits make a substantial contribution to the Australian economy and civil society in Australia.

A recent report analysing data from approximately 48,000 registered charities found that:

- the economic contribution of these charities is estimated at \$129 billion;
- the sector directly employed 840,500 full-time equivalent paid workers, and a further 471,700 full-time equivalent workers are indirectly employed; and
- the sector is roughly equivalent in size to the Australian retail sector, education and training sector or public administration and safety sector.²

There are an estimated 600,000 not-for-profits across Australia.³ However, the ACNC currently only registers and regulates charities and other specified entities, rather than the wider sector.⁴

In 2014-15, approximately 3.3 million Australians volunteered over 328 million unpaid hours per annum through charities.⁵

The sources of revenue for the sector are around 50 percent from user pay services, sales and member fees, 43 percent from government grants and 7 percent from donations and bequests.⁶

The sector plays a significant role in Australian society. The purposes of charities and not-for-profits include health, social services, education, research, sport and recreation, arts and culture, environment, community development, animal welfare, human rights, religious practices, employment and training, housing, ageing, childcare, disability, law and advocacy.⁷ They provide jobs and services as well as opportunities for the participation of individuals, families and groups in local communities and across the nation.

Disrupted landscape

The outsourcing of human services by government has created major disruptions to the sector as charities and not-for-profits compete in markets against private and commercial enterprises, including international companies. This has required new standards in terms of governance, finances, IT, performance culture and staff development. It has also led to consolidation within the sector.

It is important for government and the community, that charities and not-for-profits are able to perform in these competitive markets as their visions, missions and values commonly focus on providing quality of care and other services for our most disadvantaged and vulnerable citizens. These services are frequently provided by way of cross subsidisation to market segments that are not profitable for commercial companies.

The sector plays a key role in delivering human services:

Australia's NFPs are, on average, growing at a faster rate than for-profit or public sector organisations. This growth is the outcome of a number of factors, primarily the result of governments continuing to

² Deloitte Access Economics (2017), *Economic contribution of the Australian charity sector*, prepared for the ACNC, page 7.

³ Productivity Commission Research Report, January 2010, *Contribution of the Not-for-profit Sector*, page 53.

⁴ Division 25 of the ACNC Act.

⁵ Deloitte Access Economics (2017), *Economic contribution of the Australian charity sector*, prepared for the ACNC, page 31.

⁶ Centre for Social Impact and the Social Policy Research Centre, University of New South Wales, *Australian Charities Report 2016*, page 53.

⁷ ACNC website, viewed 30 May 2018, https://www.acnc.gov.au/ACNC/About_ACNC/Research/Background_NFP/ACNC/Edu/NFP_background.aspx?hkey=e88db8f0-3e48-4408-ab99-c2acb6ef8a1d

*outsource services to NFP providers, including those in education, welfare, disability, housing and health. Of the \$103 billion income earned in 2014, around \$42 billion was from government grants, with approximately \$54 billion from earned income and nearly \$7 billion from donations and bequests. Australia differs from other similar countries in that NFPs enjoy substantial government and commercial income but relatively low levels of philanthropy.*⁸

For example, the National Disability Insurance Scheme (NDIS) was introduced across Australia in July 2016 and is a new way of providing support for Australians with a disability, their families and carers to improve their life outcomes. Individuals have an approved NDIS plan and packages of support are funded in areas such as employment, education, social participation, independence, living arrangements and health and wellbeing. The sector features prominently among the providers of NDIS packages across Australia.

Similarly, in the area of aged care, there are a growing number of charities and not-for-profits that are providing Consumer Directed Care (CDC). CDC is a model of service delivery designed to give more choice and flexibility to aged consumers. This model allows consumers and carers more power to influence the design and delivery of the services they receive, and allows them to exercise choice of service provider and services.

The type and terminology of charities and not-for-profits is also expanding. Social enterprises are organisations with an economic, social, cultural or environmental mission consistent with a public or community benefit that trade to fulfil their mission. They reinvest the majority of their profit/surplus (derived from their trade) in the fulfilment of their mission.⁹ There are approximately 20,000 social enterprises in Australia (many of which are charities and not-for-profits) that operate in local, national and international markets.¹⁰

Social impact investment brings together capital and expertise from government, private sector and charities and not-for-profits to achieve a measurable social outcome. Across the Organization for Economic Co-operation and Development (OECD) there are 90 social impact investments in 19 countries mobilising over \$550 million in capital.¹¹

In Australia there is a nascent market of ten social impact investments in New South Wales, Queensland and South Australia.¹² For example, the Newpin social impact investment is a partnership between the NSW Government, Uniting and Social Ventures Australia. Over four years it has restored 203 children to their families from out-of-home care; prevented children in 55 at-risk families from entering out-of-home care; has a cumulative restoration rate of 63 percent compared to the norm of 19 percent; and investors received a 13 percent return in 2017.¹³

Technology and competition have led to various forms of fundraising including online crowd-funding, third party commercial fundraising agencies, commission-based and face-to-face fundraising, all of which present challenges to regulators and the sector.¹⁴

The ACNC has established itself as a 'digital-first agency'¹⁵ and is a leader among international charity regulators. Foundation tasks for the ACNC included establishing a website, a portal for charities and

⁸ Susan Pascoe AM (2017), *The Digital Regulator*, Myles McGregor-Lowndes and Bob Wyatt (Eds), *Regulating Charities: The Inside Story*, New York, 2017, page 212.

⁹ Barraket, Collyer, O'Connor and Anderson (2010), *Finding Australia's Social Enterprise Sector: Final Report*, The Australian Centre for Philanthropy and Non-profit Studies, viewed 30 May 2017, <https://www.socialtraders.com.au/wp-content/uploads/2018/02/FASES-2010-full-report.pdf>

¹⁰ Department of Social Services (2015), *A New System For Better Employment and Social Outcomes – Final Report of the Reference Group on Welfare Reform to the Minister for Social Services*, page 172.

¹¹ Department of Social Services (2015), *A New System For Better Employment and Social Outcomes – Final Report of the Reference Group on Welfare Reform to the Minister for Social Services*.

¹² Department of Social Services (2015), *A New System For Better Employment and Social Outcomes – Final Report of the Reference Group on Welfare Reform to the Minister for Social Services*, page 172.

¹³ Office of Social Impact Investment website, viewed 30 May 2018, <https://www.osii.nsw.gov.au/initiatives/social-benefit-bonds/>

¹⁴ Submission, ACCC, 27 February 2018.

¹⁵ Susan Pascoe AM (2017), *The Digital Regulator*, Myles McGregor-Lowndes and Bob Wyatt (Eds), *Regulating Charities: The Story*, New York, 2017, page 211.

other entities registered under the ACNC Act and an online register.¹⁶ The ACNC's success in embracing and promoting the use of its digital presence is highlighted by 99 percent of registered entities interacting with the ACNC online.¹⁷ Furthermore, the ACNC's achievements in implementing a digital interface were recognised by the Institute of Public Administration Australia when it won the Public Sector Innovation Award in 2016 for its online service which allows registered entities to (amongst other things) update their details with the ACNC and submit their AIS (Charity Portal).

The ACNC has commissioned three studies into public trust and confidence in Australian charities (2013, 2015 and 2017). There has been a decline in public trust and confidence in charities.¹⁸ Specifically, the 2017 report stated there has been a 13 percent decline in public trust and confidence in charities since 2013.¹⁹

The Australian Charities and Not-for-profits Register (Register) allows the public to search for information about a registered entity, for example, if they want to donate or volunteer. The Register also provides information on the names and roles of the responsible persons for a registered entity, such as its board or committee members or trustees. However, when asked about the Register, only 21 percent of Australians were aware of its existence, and only seven percent use the Register.²⁰ This finding seems consistent with international experience:

Paradoxically, research from North America and Europe reveals few donors use such metrics in their donation decisions, even when they are freely available.²¹

Giving Australia research captures the tension between innovation and regulation:

A strong view emerged from the qualitative material that, although regulation was important to safeguard people and the industry, over-regulation worked against participation and progress, including the opportunities to be innovative and responsive to changes.²²

As a nation, Australia needs to support a vibrant charities and not-for-profits sector, encourage philanthropy and volunteering, reduce red tape and enforce the law on misconduct.

The Australian Charities and Not-for-profits Commission

History

The ACNC was born out of a broken system of regulation of the sector and six national inquiries on regulation over 15 years. Responsibility for regulation of the sector had been shared by the Australian Taxation Office (ATO), Australian Securities and Investments Commission (ASIC) and a range of government agencies in the States and Territories.

The six national inquiries²³ into the regulation of the sector consistently recommended the establishment of an independent regulator for the sector. The report issued by the Productivity

¹⁶ Susan Pascoe AM (2017), *The Digital Regulator*, Myles McGregor-Lowndes and Bob Wyatt (Eds), *Regulating Charities: The Inside Story*, New York, 2017, page 220.

¹⁷ Susan Pascoe AM (2017), *The Digital Regulator*, Myles McGregor-Lowndes and Bob Wyatt (Eds), *Regulating Charities: The Inside Story*, New York, 2017, page 220.

¹⁸ Kantar Public (2017) *ACNC Public Trust and Confidence in Australian Charities 2017 Market Research Report October 2017*, prepared for the ACNC, para 6.1.

¹⁹ Kantar Public (2017) *ACNC Public Trust and Confidence in Australian Charities 2017 Market Research Report October 2017*, prepared for the ACNC, para 1.4.

²⁰ Kantar Public (2017) *ACNC Public Trust and Confidence in Australian Charities 2017 Market Research Report October 2017*, prepared for the ACNC, para 4.3.

²¹ McGregor-Lowndes, Flack, Poole and Marsden (2014), QUT Business School – The Australian Centre for Philanthropy and Non-profit Studies, *ACPNS Current Issues Information Sheet 2014/2, Defining and Accounting for Fundraising Income and Expenses*, page 1.

²² Department of Social Services (2017) *Giving Australia 2016 – Individual giving and volunteering*, page 94.

²³ 1995 Industry Commission Report, *Charitable Organisations in Australia*; 2001 Report of the Inquiry into the Definition of Charities and Related Organisations (Charities Definition Inquiry); 2008 Senate Standing Committee on Economics, Inquiry into the Disclosure Regime for Charities and Not-for-Profit Organisations; 2010 Productivity Commission Report, *Contribution of the Not-for-Profit Sector*; 2010 Australia's Future Tax System Review (the Henry Review); 2010 Senate Economics Legislation Committee, Inquiry into Tax Laws Amendment (Public Benefit Test) Bill.

Commission in 2010, titled ‘Contribution of the Not-for-Profit Sector’ (Productivity Commission Report), stated:

... Compliance costs are minimised when not-for-profit entities have to face a single clear set of requirements—whether in regard to registration, tax endorsement or fundraising—with common reporting standards and requirements, and where one report satisfies most, if not all, obligations. The public benefits from this when it can easily access information on a not for profit entity from a trustworthy source, as do philanthropists and government agencies. The challenge is to provide a regulatory system that offers these advantages.²⁴

The Treasury’s 2011 paper, ‘Scoping Study for a National not-for-profit Regulator’, argued:

Recent trends have seen higher levels of governance and accountability requirements of both the commercial and government sectors in Australia; however, the NFP sector has been ignored. The overall governance and accountability arrangements in the NFP sector have not kept pace with international trends to improve governance in the sector.²⁵

A taskforce was established in July 2011 to oversee the establishment of the ACNC. Following extensive consultations, Treasury developed an exposure draft of the Australian Charities and Not-for-profits Commission Bill 2012 (ACNC Bill).

The exposure draft was released in December 2011 and the draft legislation was subject to intense scrutiny and various amendments. Once introduced, the parliamentary debate was robust and lengthy. There were criticisms and concerns raised by various stakeholders, including that the ACNC would increase red tape for the sector.²⁶ However, the ACNC Bill was passed in both Houses of Parliament and received Royal Assent on 3 December 2012.

In 2014, the new Government introduced a Bill to repeal the ACNC Act but it was not enacted.

Establishment

The ACNC is established under section 105-5 of the ACNC Act. Pursuant to section 15-5, the ACNC Act has the following objects:

- maintain, protect and enhance public trust and confidence in the sector;
- support and sustain a robust, vibrant, independent and innovative sector; and
- promote the reduction of unnecessary regulatory obligations on the sector.

The ACNC currently only regulates charities and some other entities (including health promotion charities (HPCs) and public benevolent institutions (PBIs)), rather than the wider sector. To achieve these objects, the ACNC:

- registers entities as charities;
- helps registered entities understand and meet their obligations through information, guidance, advice and other support;
- helps the public understand the work of registered entities through information, guidance, advice and other support;
- maintains a free and searchable public register so that anyone can look up information about registered entities; and

²⁴ Productivity Commission Research Report, January 2010, *Contribution of the Not-for-profit Sector*, page 115.

²⁵ The Treasury (2011), *Scoping Study for a national not-for-profit regulator – Final report*, page 57.

²⁶ Susan Pascoe AM (2017), *The Digital Regulator*, Myles McGregor-Lowndes and Bob Wyatt (Eds), *Regulating Charities: The Inside Story*, New York, 2017, page 216.

- works with government departments and agencies to develop a 'report-once, use-often' reporting framework for registered entities.²⁷

It is important to note that charities can register with the ACNC but are not required to do so. However, charities which do not register with the ACNC are not entitled to an exemption from income tax and cannot access other Commonwealth tax concessions.²⁸

Staffing and resourcing

The 2016–17 budget for the ACNC was \$14.611 million, with an additional allocation of \$3.922 million from prior year unspent Special Account funds.²⁹ This compared to a budget of \$14.812 million in 2015-2016.³⁰ The ACNC has only been funded to undertake the first object.³¹

In the 2016-2017 financial year, the ACNC had a full-time equivalent staff of 107.5 people.³² This level of staffing has remained relatively constant over the past four years.

By way of comparison to other regulatory bodies, ASIC's government funding in the 2016-2017 financial year was \$342 million (plus an additional \$7 million in own source revenue) and its full-time equivalent staff in that year was 1,640.³³ The government funding for the Australian Competition and Consumer Commission (ACCC) in 2016-2017 was \$174 million (plus an additional \$4 million in own source revenue) and its full-time equivalent staff in that year was 772.³⁴

²⁷ ACNC website, viewed 30 May 2018, https://www.acnc.gov.au/ACNC/About_ACNC/ACNC_role/ACNC/Edu/ACNC_role.aspx?hkey=88635892-3c89-421b-896d-d01add82f4fe

²⁸ There is no reliable data as to the number and size of charities which have chosen not to register with the ACNC.

²⁹ ACNC Annual Report 2016-2017, page 104.

³⁰ ACNC Annual Report 2015-2016, page 103.

³¹ Submission, ACNC, received 19 January 2018, page 20.

³² ACNC Annual Report 2016-2017, page 108.

³³ ASIC Annual Report 2016-2017, pages 26 and 183.

³⁴ ACCC Annual Report 2016-2017, pages 11 and 13.

PART A – OBJECTS, FUNCTIONS AND POWERS

1. Objects

Introduction

Legislation

The objects of the ACNC Act embody the ACNC's role as the independent national regulator of the sector. However, the ACNC currently only registers and regulates charities and other specified entities, rather than the wider sector.³⁵

Specifically, section 15-5(1) states that the objects of the ACNC 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.*

The current objects reflect a Commission which is primarily tasked with supporting the sector. The regulation of the sector is a means by which the objects are to be achieved. Section 15-5(2) of the ACNC Act provides that the objects are achieved by:

- (a) *establishing a national regulatory framework for not-for-profit entities that reflects the unique structures, funding arrangements and goals of such entities; and*
- (b) *establishing the Commissioner of the Australian Charities and Not-for-profits Commission, who will:*
 - (i) *be responsible for registering entities as not-for-profit entities according to their type and subtypes; and*
 - (ii) *administer the national regulatory framework; and*
 - (iii) *assist registered entities in complying with and understanding this Act, by providing them with guidance and education.*

The exposure draft of the ACNC Bill circulated on 9 December 2011 only included a single object, being to 'promote public trust and confidence in not-for-profit entities that provide public benefits.'³⁶ Following extensive lobbying from the sector, the word 'maintain' was added to the first object in the ACNC Bill.³⁷

Sector representatives also lobbied for the addition of the second and third objects in the ACNC Act. The addition of the third object, in relation to red tape reduction, was supported by the House of Representatives Standing Committee on Economics. Specifically, recommendation 1 of the Committee's report on the Exposure Draft of the ACNC Bills noted:

*That the objects of the Australian Charities and Not-for-profits Commission Bill 2012 explicitly include the reduction of red tape.*³⁸

While the ACNC Act was enacted including three objects, since its establishment in 2012, the ACNC advised the Panel that it has only been funded to undertake the first object.³⁹ As such, the ACNC has

³⁵ Division 25 of the ACNC Act.

³⁶ Exposure draft of the ACNC Bill, viewed 29 May 2018, https://static.treasury.gov.au/uploads/sites/1/2017/06/acnc_exposure_draft.pdf.

³⁷ Susan Pascoe AM (2017), *The Digital Regulator*, Myles McGregor-Lowndes and Bob Wyatt (Eds), *Regulating Charities: The Inside Story*, New York, 2017, page 216.

³⁸ House of Representatives Standing Committee on Economics, Report on the *Australian charities and Not-for-profits Commission Bill 2012*, August 2012, paragraph 2.24.

³⁹ Submission, ACNC, received 19 January 2018, page 20.

been shaped by both its expanded objects and its limited resources to perform the second and third objects.

Section 15-10 of the ACNC Act outlines the various factors that the Commissioner must have regard to in performing his or her functions and exercising his or her powers. The functions and powers of the Commissioner are discussed further in chapters 2 and 3 respectively.

What we have heard

Proposed additional objects

An overwhelming majority of submissions supported the current objects of the ACNC Act, with many stating that the objects are relevant, contemporary and adequate.

For example, the submission from Mental Health Australia stated:

From our perspective, the ACNC Act has worked well to date and remains contemporary. We support the objects of the ACNC Act and the positive impact the ACNC has had on the charity and not-for-profit sector.⁴⁰

While the ACNC recognises that the current objects of the ACNC Act continue to be relevant, in its submission it considered that there may be benefit in the following two additional objects being included in the ACNC Act:

- *to promote the effective use of the resources of not-for-profit entities; and*
- *to enhance the accountability of not-for-profit entities to donors, beneficiaries and the public.⁴¹*

The ACNC submitted that these are appropriate objects for a regulator of the sector but it does not elaborate further on the reasoning for requesting these additional objects.

In the Commissioner's Column published on the ACNC website on 25 January 2018, the Commissioner noted:

These recommended objects are not designed to create restrictions or impose limitations on charities.

...

We believe the ACNC can play an important educative role for charities and the public on the importance of efficiencies, the challenges of operating in a not-for-profit market, and the opportunities available to organisations to increase their own efficiency.⁴²

The ACNC also noted that any additional objects would need to be accompanied by additional functions and powers, as well as resourcing, to enable the objects to be met.

Other submissions overwhelmingly rejected the addition of the ACNC's two proposed objects. The reasons included:

- an over-reach of power by the ACNC;
- effectiveness should not be determined by the ACNC;
- that an entity's governing board (or other responsible persons) is the body that should be responsible for determining effectiveness;
- that the additional objects are unnecessary; and
- that the ACNC should not be dissipating its resources on additional objects.

⁴⁰ Submission, Mental Health Australia, 28 February 2018, page 1.

⁴¹ Submission, ACNC, received 19 January 2018, page 21.

⁴² ACNC website, viewed 7 May 2018, http://www.acnc.gov.au/ACNC/Comms/Com_Col/CC20180125.aspx.

The consensus on the first proposed additional object from the sector was succinctly summarised in the submission from Suicide Prevention Australia (SPA):

Effectiveness is subjective and contextual, and inextricably linked with organisation type, target group, jurisdiction and operating environment, among other things. Definitions of effectiveness are therefore highly dependent on these factors and differ from organisation to organisation. SPA disputes suggestions that the ACNC Act should be amended to give the ACNC an additional role in enforcing or otherwise managing the organisational effectiveness of registered entities.⁴³

In addition, Research Australia drew attention to the impracticality of the ACNC undertaking such a role:

Not only is such an object undesirable, in a sector as diverse as the charities sector, it is unnecessary and highly impractical. ...

Research Australia does not believe the ACNC has nor should have the necessary expertise to assess whether the programs implemented by a charity in this regard, are effective, or could be more effective. While it might theoretically [be] possible for the ACNC to acquire to a point, a greater degree of expertise in all the areas that charities operate, Research Australia submits that this would require significant new resources and would direct ACNC resources away from its existing activities.⁴⁴

In relation to the second proposed additional object, the submission from the Prime Minister's Community Business Partnership outlined the argument against its necessity:

This goal is already explicit in the principal Act ([sections] 15-10, 45-5 and 50-5) and is implicit in Object 1 as part of the goal of enhancing public trust and confidence in the sector. It would also appear to be well served through the ACNC's existing core functions, specifically monitoring and managing compliance and providing education and advice. The Partnership considers this goal can be best achieved through appropriate education and guidance by the ACNC rather than through adding a new object in the principal Act.⁴⁵

Other than the submission from the ACNC, the Panel received very few submissions calling for additional objects.

Prioritisation of the objects

A small number of submissions proposed the rephrasing of the current objects or the prioritisation of the first or second object.

Other views heard by the Panel included the following:

- the first object is the primary and only required object of the ACNC Act;
- the first object is unnecessary because there is already a high level of trust and confidence in the sector;
- the role of the ACNC in innovation (the second object) is inappropriate and innovation is solely within the purview of the sector;
- the ACNC should be a centre for excellence for the sector with regulation being incidental to its broader vision;
- the ACNC should continue to take a lead role in identifying and addressing red tape constraints on the performance of the sector (the third object); and
- the ACNC has played a strong educative role in the sector to date which has helped to achieve the third object.

⁴³ Submission, Suicide Prevention Australia, 19 February 2018, page 2.

⁴⁴ Submission, Research Australia, 28 February 2018, page 2.

⁴⁵ Submission, Prime Minister's Community Business Partnership, received 8 March 2018, page 16.

Our consideration of the issues

The Terms of Reference include a requirement for the Panel to evaluate the suitability and effectiveness of the extent to which the objects of the ACNC continue to be relevant.

Relevance of the current objects

The Panel notes that similar to declining public trust and confidence in other sectors, there has been a decline in public trust and confidence in charities and not-for-profits in Australia, as well as a seeming disregard for the existence of the Register (see the Introduction to this Report). The decline in public trust and confidence and the challenges faced by the ACNC in reversing the decline is seen by some as a reason to change the first object. However, the Panel does not believe that the decline in public trust and confidence compels a change in the current objects of the ACNC.

Submissions and consultations affirmed that the current objects of the ACNC remain relevant and contemporary. This is clear given the sector's support of the ACNC and the many submissions recognising the success of the ACNC in pursuing the current objects in the ACNC Act to date.

There have been no other compelling arguments, if any, presented to the Panel to support the current objects being ineffective or deficient.

Proposed additional objects

The Panel had regard to the following factors in considering whether the ACNC Act should be amended to include the additional objects proposed by the ACNC:

- the response to the additional objects from the sector in submissions;
- the appropriateness and necessity of the additional objects;
- the nature and extent of the Commissioner's existing functions and powers; and
- the response to similar objects from the sector in England and Wales.

The additional objects proposed by the ACNC are based on the statutory objectives for the Charity Commission for England and Wales (CCEW). The *Charities Act 2011* (UK) sets out five objectives for the CCEW including:

- to promote the effective use of charitable resources; and
- to enhance accountability of charities to donors, beneficiaries and the general public.

The legislative scheme in England and Wales is different from that in Australia. The CCEW is solely focused on charities whereas the Australian scheme is designed for the wider not-for-profits sector. The additional objects proposed by the ACNC are more suitable to charities and, as such, may not necessarily be appropriate objects under the Australian scheme.

In addition, when consulted by the Panel, the CCEW stressed that it was for charities to make decisions on the allocation of resources.

The Panel notes that the objectives of the CCEW were criticised for being too broad and ambitious given its budget.⁴⁶ Furthermore, it has been suggested that these two objects do not appear to have had any positive impact on the charities and not-for-profits sector in the UK.⁴⁷ The Panel observes that the indifferent response from the charities and not-for-profits sector in England and Wales to the additional objects does not support the implementation of these objects in Australia.

⁴⁶ Lindsay Driscoll (2017), *The Reforming Regulator*, Myles McGregor-Lowndes and Bob Wyatt (Eds), *Regulating Charities: The Inside Story*, New York, 2017, page 39.

⁴⁷ Tony Featherstone (2018), *Putting the squeeze on Charity*, viewed 7 May 2018, <http://aicd.companydirectors.com.au/membership/company-director-magazine/2018-back-editions/april/putting-the-squeeze-on-charity>.

Finally, the Panel notes that subsections 110-10(1) and (2) of the ACNC Act already provide that the Commissioner has the function of:

- assisting registered entities in complying with and understanding the ACNC Act by providing them with guidance and education; and
- assisting the public in understanding the work of the sector to improve the transparency and accountability of the sector by giving the public relevant information on the Commissioner's website.

The sector's primary concern in response to the ACNC's first proposed additional object is whether the ACNC has the skills to review an entity's effective use of resources. The sector's concern in response to the ACNC's second proposed additional object is that it is unnecessary to achieve the desired outcome.

The lack of support for the proposed additional objects appears to the Panel to be substantially based on matters of principle. The objects of the ACNC are focussed on supporting the sector, and the proposed additional objects are more akin to functions and powers. Insofar as promoting the effective use of resources of, and enhancing the accountability of, not-for-profits as required, the Commissioner already has sufficient functions and powers.⁴⁸

In addition, in exercising his or her functions and powers to promote the effective use of an entity's resources, or enhance accountability, the Commissioner would need to ensure his or her actions do not substantially increase red tape and the regulatory compliance burden imposed on registered entities (as doing so would be contrary to the third object in the ACNC Act).

The Panel considers that it is unnecessary to amend the ACNC Act to include the additional objects proposed by the ACNC.

In relation to other additional objects that were proposed in submissions, the Panel reached similar conclusions. In general, the issues raised were more akin to functions and powers than objects.

Prioritisation of the objects

The Panel received very few submissions that suggested the prioritisation of either the first or the second object over the other objects of the ACNC Act. While further steps in reducing red tape and unnecessary regulatory obligations on the sector were highlighted in many submissions,⁴⁹ there was no support in submissions for prioritising the third object. Nevertheless, in view of the Panel's recommendations in relation to red tape reduction, especially in the areas of fundraising reform, the enhanced use of the Charity Passport⁵⁰ and the development of a single national scheme for the regulation of charities and not-for-profits, there needs to be a focus on the third object in the coming years.

In the Panel's view, the arguments for the prioritisation of any of the objects in submissions were not strong enough to warrant amending the current objects of the ACNC Act.

⁴⁸ See the discussion of the functions and powers of the Commissioner in chapters 2 and 3 respectively for further information.

⁴⁹ See, for example, chapters 12 and 13 on fundraising and the one-stop-shop.

⁵⁰ The Charity Passport enables authorised government departments and agencies to access ACNC charity data via a file transfer protocol process.

Furthermore, maintaining the current objects without prioritisation provides the Commissioner with the flexibility to prioritise the most appropriate object at the relevant time. By maintaining the current structure of the objects, the Commissioner can prioritise the allocation of resources towards any of the current objects depending on the current environment, the needs of the sector and the resources available to the ACNC.

Conclusions

The objects in section 15-5 of the ACNC Act continue to be relevant and contemporary and it is unnecessary for the objects to be either expanded or prioritised.

In assessing the objects of the ACNC, the Panel finds that the ACNC is currently under-resourced to pursue the objects in section 15-5 of the ACNC Act.

Recommendation 1

The objects in the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) not be changed.

2. Functions

Introduction

The Terms of Reference require the Panel to consider whether the functions of the Commissioner are sufficient to enable the objects to be met. The Terms of Reference also require the Panel to assess the effectiveness of the provisions and the regulatory framework established by the ACNC Act to achieve the objects.

The Commissioner is a statutory office holder appointed to administer the ACNC Act, and is supported in this role by the staff of the ACNC. The Commissioner reports to the Assistant Minister to the Treasurer and provides an annual report to the Commonwealth Parliament. In regulating registered entities, the ACNC follows regulatory principles.⁵¹

Section 15-10 of the ACNC Act sets out the matters that the Commissioner must have regard to in performing his or her functions and exercising his or her powers, but does not specifically define the functions of the Commissioner, beyond setting out assistance functions.

In performing his or her functions and exercising powers, the matters to which the Commissioner must have regard to include:

- (a) *the maintenance, protection and enhancement of public trust and confidence in the not-for-profit sector;*
- (b) *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;*
- (c) *the benefits gained from providing information to the public about not-for-profit entities;*
- (d) *the maintenance and promotion of the effectiveness and sustainability of the not-for-profit sector;*
- (e) *the following principles:*
 - (i) *the principle of regulatory necessity;*
 - (ii) *the principle of reflecting risk;*
 - (iii) *the principle of proportionate regulation;*
- (f) *the need for the Commissioner:*
 - (i) *to cooperate with other Commonwealth government agencies; and*
 - (ii) *to administer effectively the laws that confer functions and powers on the Commissioner;*
(including in order to minimise procedural requirements and procedural duplication);
- (g) *the benefits gained from assisting registered entities in complying with and understanding this Act, by providing them with guidance and education;*
- (h) *the unique nature and diversity of not-for-profit entities and the distinctive role that they play in Australia.*⁵²

⁵¹ ACNC website, Regulatory Approach Statement, viewed 30 May 2018, https://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/ACNC/Regulatory/Reg_approach.aspx?hkey=8251156f-f3c9-41bb-800a-304c2485be09.

⁵² Section 15-10 of the ACNC Act.

Assistance functions

The assistance functions contained in section 110-10 of the ACNC Act provide:

- (1) *The Commissioner has the function of assisting registered entities in complying with and understanding this Act, by providing them with guidance and education.*
- (2) *The Commissioner also has the function of assisting the public in understanding the work of the not-for-profit sector, in order to improve the transparency and accountability of the sector, by giving the public relevant information on the Commission's website.*
- (3) *To avoid doubt, this section does not limit any other function of the Commissioner.*

Section 110-10 of the ACNC Act would appear to give emphasis to the guidance and education functions of the ACNC, both to registered entities and to the sector and public more broadly. In this regard, the Panel notes that in its short existence, the ACNC has developed:

- a strong focus on education and communication, including factsheets, checklists, templates, telephone and email help services;
- a research function which provides an evidence base for guidance material and reporting on the sector. For example, the ACNC produces reports on compliance and case studies to guide behaviour. It also commissions external research, including the economic contribution of the sector, measuring and reducing red tape, level of trust and confidence in the sector, and sustainability of the sector;
- a research network that aims to strengthen links between researchers and the sector; and
- initiatives to enhance the public trust and confidence in registered entities, including the ACNC Tick of Charity Registration (Registered Charity Tick), which shows a registered entity is transparent and accountable by highlighting its presence on the Register.

What we have heard

The ACNC functions were not specifically identified as a concern in consultations. However, the Panel also considered international experiences and in this context, consultation with the Charity Commission for England and Wales (CCEW) and consideration of the *Charities Act 2011* (UK) identified that the functions in the ACNC Act could be better aligned with the objects. The Panel notes that the *Charities Act 2011* (UK) very clearly sets out the objectives, functions and duties of the CCEW.

Stakeholders were highly supportive of the collaborative, educative and risk-based approach that the ACNC has taken to its functions to date and believe this should form the basis for going forward.⁵³

The Queensland Law Society (QLS) stated that it is:

*Firmly of the view that the objects of the ACNC are best and most efficiently achieved through education and training to achieve compliant regulatory behaviour, including behavioural nudging...*⁵⁴

and that the ACNC, as a new regulator, has performed above expectations:

*Of particular note is its creation and adoption of a public regulatory strategy and approach which has served it well. Its use of behavioural nudging to improve compliance is leading other charity regulators and other agencies, nationally and internationally.*⁵⁵

Throughout the consultation process, stakeholders endorsed the ACNC's collaborative approach to date and emphasised that this approach should continue.

⁵³ Submission, COSS, received 28 February 2018; Submission, the Benevolent Society, 28 February 2018.

⁵⁴ Submission, QLS, 28 February 2018, Appendix, page 1.

⁵⁵ Submission, QLS, 28 February 2018, Appendix, page 8.

Our consideration of the issues

Functions of the Commissioner

The functions of the Commissioner should be more clearly articulated in the ACNC Act and specifically align with the objects of the ACNC Act. In addition, the functions could better reflect the changing nature of the sector, its interface with the ACNC and the partnership between government and the sector in delivering human services.

The Panel suggests a function to enforce the law of charities be included. This is inserted because the capacity of the Commissioner to pursue enforcement could be limited if there is not an explicit responsibility set out in the functions.

The Panel is also of the view that for greater clarity, general duties of the Commissioner should be inserted into the ACNC Act.

The Panel supports the ACNC continuing to focus on the education and research provision role that has served it so well over the first five years of operation and is articulated separately under the assistance functions of the ACNC Act.⁵⁶ The Panel is mindful that the research undertaken by the ACNC on the sector is widely used and should continue.

The Panel considers that an outcomes-based approach to regulation in the sector is appropriate. The culture that the ACNC has set to date in working with registered entities and the wider sector to educate and inform them on how to meet their compliance requirements has been positively received, with this type of 'behavioural nudging' being well accepted by stakeholders.

The Panel notes that the ATO uses behavioural nudging to encourage taxpayers to lodge paperwork on time and to accurately report income and deductions.⁵⁷ The Panel suggests the ACNC could work with the ATO's Behavioural Insights Unit to develop further tools to encourage compliance with the ACNC Act by reducing the barriers and friction points that hinder registered entities from easily complying on their own.

The Panel supports the concept of the Registered Charity Tick and considers that it has a positive effect on public trust and confidence in registered entities. Currently the Registered Charity Tick is available for registered entities that meet their reporting obligations. The ACNC should consider whether the Registered Charity Tick could be used to show compliance with standards above minimum requirements. For example, this approach could be useful for registered entities that voluntarily provide annual financial reports.

Conclusions

The ACNC Act should clearly articulate functions of the Commissioner that align with each object.

The following functions should be inserted into the ACNC Act, following the objects:

The functions of the ACNC are:

- (1) to maintain a register of registered entities;
- (2) to ensure appropriate transparency and accountability of the charities and not-for-profits sector to the public (including donors, beneficiaries and members) by providing access to information about registered entities;
- (3) to maintain and promote the effectiveness and sustainability of the charities and not-for-profits sector;

⁵⁶ Section 110-10 of the ACNC Act.

⁵⁷ CPA Australia, *'In the Black: Can behavioural economics really change habits?'* April 2018.

- (4) to assist registered entities in complying with and understanding this Act, by providing them with guidance and education;
- (5) to undertake the research and analysis necessary to provide up-to-date information to the public about the charities and not-for-profits sector;
- (6) to promote the removal of regulatory burdens imposed on registered entities including burdens imposed by Commonwealth, State, Territory and local governments; and
- (7) to enforce the law of charities.

In addition, the following duties be inserted into the ACNC Act:

In undertaking the functions, the Commissioner must have regard to the following:

- (1) the maintenance, protection and enhancement of public trust and confidence in the charities and not-for-profits sector;
- (2) the independence of the charities and not-for-profits sector and the need to respect religious and other freedoms; and
- (3) the principles of:
 - (a) regulatory necessity;
 - (b) reflecting risk; and
 - (c) proportionate regulation.

The ACNC's education and research functions are highly valuable and should continue to be a priority. This includes continuing to focus on the provision of high quality guidance material and research reports.

The ACNC should continue to work collaboratively with the sector in an educative way and broaden the use of incentives to encourage and reward good behaviour. This includes working with the ATO's Behavioural Insights Unit and expanding the use of the Registered Charity Tick to encourage a higher level of compliance.

Recommendation 2

The ACNC Act be amended to include functions and duties that align with the objects.

Recommendation 3

The ACNC should continue to prioritise its education and research functions, including the use of behavioural insights and incentives.

3. Powers

Introduction

Responsible persons and responsible entities

The persons responsible for the governance of registered entities are described in the ACNC Act as ‘responsible entities’.⁵⁸ However, in its educational and explanatory material the ACNC describes the people responsible for the governance of charities as ‘responsible persons’.⁵⁹ This Report generally uses the terminology of the ACNC in its educational and explanatory material (that is, responsible persons).

The ATO uses the expression ‘responsible people’ but its meaning is different from the ACNC’s ‘responsible person’. The ATO expression is defined as ‘people or institutions who, because of their tenure of some public office or their position in the community, have a degree of responsibility to the community as a whole’.⁶⁰

The scope of the Commissioner’s powers

The Commissioner has the power to do all things necessary or convenient to be done for, or in connection with, the performance of his or her functions.⁶¹

This wide statement of powers enables the Commissioner to rely not only upon specific provisions in the ACNC Act but also the common law, equity and State and Territory legislation to carry out the objects of the ACNC Act. Some States give their Supreme Courts very extensive powers to make orders in relation to charities in general, and charitable assets in particular, on the application of any interested person, which could include the Commissioner.⁶²

The ACNC’s enforcement powers under the ACNC Act are limited to registered entities which are federally regulated entities (FREs).

An FRE is defined in section 205-15 of the ACNC Act as:

- (a) a ‘constitutional corporation’ [defined by section 2015-20 as a corporation to which paragraph 51(xx) of the Constitution applies; or a body corporate that is incorporated in a Territory]; 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 section 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 a Territory; or
- (e) an entity, the core or routine activities of which are carried out in or in connection with a Territory.

In relation to FREs, the ACNC Act provides the Commissioner with powers of information gathering,⁶³ monitoring,⁶⁴ giving directions,⁶⁵ and the suspension⁶⁶ and replacement of a responsible person with a person or persons of the Commissioner’s choosing.⁶⁷

⁵⁸ Section 205-30 of the ACNC Act.

⁵⁹ For example, ACNC website, viewed 11 May 2018, http://www.acnc.gov.au/ACNC/FTS/FS_RespPers.aspx.

⁶⁰ ATO website, viewed 30 May 2018, https://www.ato.gov.au/Non-profit/Getting-started/In-detail/Types-of-DGRs/Public-funds/?page=3#What_are_the_requirements_of_a_public_fund.

⁶¹ Section 110-15 of the ACNC Act.

⁶² For example, sections 6 and 7 of the *Charitable Trusts Act 1993 (NSW)* and subsection 106(2) of the *Trusts Act 1973 (Qld)*.

⁶³ Division 70 of the ACNC Act.

⁶⁴ Division 75 of the ACNC Act.

⁶⁵ Division 85 of the ACNC Act.

⁶⁶ Section 100-10 of the ACNC Act.

⁶⁷ Section 100-30 of the ACNC Act. The power to replace a responsible person with a person or persons of the Commissioner’s choosing does not apply to responsible persons of a FRE which is also a BRC.

In relation to registered entities that are not FREs, or charities that are not registered under the ACNC Act, the Commissioner does not have express power under the ACNC Act to protect charitable assets. That power, and powers and responsibilities generally for the supervision of charities in Australia, remains with the State and Territory Attorneys-General.

The Explanatory Memorandum to the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 explained:

The establishment of the Commission has introduced new powers in information collection, monitoring and compliance that are not available to Commonwealth bodies with comparable roles, such as the Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority.

... the establishment of the ACNC has introduced new powers in relation to information collection, monitoring and compliance that did not previously exist at a Commonwealth level.⁶⁸

The scope of the Commissioner's discretion

The ACNC Act grants wide discretions to the Commissioner that are not reviewable afresh on appeal (de novo review). When the Senate Standing Committee for the Scrutiny of Bills reviewed the ACNC Bill it expressed concern that:

...where the ACNC Commissioner exercises a discretionary power it is not clear what is required to prove that the decision is wrong or should have been made differently.⁶⁹

These concerns were addressed in *Waubra Foundation v Commissioner of the Australian Charities and Not-for-profits Commission*,⁷⁰ the only decision to date on the ACNC Act. The Administrative Appeals Tribunal found that a court is not permitted to review the decision afresh on hearing the appeal and held:

...in our view it will not necessarily be sufficient for the applicant to show that one or more of the grounds relied upon has been made out. We must affirm the decision under review unless we are satisfied, by reference to the considerations made relevant by the ACNC Act, and the material before us, that that decision should not have been made, or should have been made differently.⁷¹

ACNC internal governance structure

The ACNC has an internal governance structure of a single Commissioner with two Assistant Commissioners. The Advisory Board does not exercise a governance function and there is not a separate executive governance structure. This results in a consolidation of decision-making power in the Commissioner alone.

Delegations

The Commissioner can delegate his or her powers and functions to a Senior Executive Service (SES) employee to assist in carrying out the work of the Commission. However, the ACNC only has two other SES employees – the two Assistant Commissioners – to whom these powers and functions can be delegated.

The ACNC, in its submission, has asked for the Commissioner to be given a broader delegation power to facilitate more efficient decision making.⁷²

⁶⁸ Explanatory Memorandum to the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014, pages 1 and 2.

⁶⁹ Senate Standing Committee for the Scrutiny of Bills, 31 October 2012, 'Thirteenth Report of 2012' (Report 13/2012,) page 449.

⁷⁰ *Waubra Foundation and Commissioner of Australian Charities and Not-for-profits Commission* [2017] AATA 2424 (4 December 2017).

⁷¹ *Waubra Foundation and Commissioner of Australian Charities and Not-for-profits Commission* [2017] AATA 2424 (4 December 2017), para 48.

⁷² Submission, ACNC, received 19 January 2018, recommendation 33, page 61.

Regulatory Approach

The ACNC's Regulatory Approach Statement states that the ACNC exercises its powers in accordance with its values and the matters specified in section 15-10 of the ACNC Act.⁷³

The ACNC uses its powers to address the risks and evidence presented. The assumption is that registered entities are acting honestly and are given a chance to address any concerns that may arise. The least intrusive powers required to address the concerns are used, but the ACNC will act quickly in cases where gross negligence or serious misconduct has been established, or where vulnerable people or significant charitable or other assets are at risk.

What we have heard

The general view of stakeholders is that most registered entities and other charities act honestly. However, this Report is written against the backdrop of a report into misuse of charitable assets by directors of The Returned and Services League of Australia (New South Wales Branch) and related entities.⁷⁴ There were also other less public examples of misapplication of charitable assets to which the Panel's attention was drawn. Overall the submissions and consultations suggest that 'on balance' the range of powers available to the Commissioner to enable him or her to effectively address misconduct by registered entities are sufficient.⁷⁵

The limited rights to challenge the Commissioner's decisions and the discretion given to the Commissioner were identified as a concern. The Law Council of Australia (LCA) recommended clarification of the right to judicial review to enable a registered entity to challenge a decision of the Commissioner, such as the power to appoint a responsible person. There is some concern about the risk of abuse of powers and with this a need for appropriate safeguards to be put into place.

Under the ACNC Act, the right to object to the removal of a responsible person is conferred only on the person removed and not the registered entity itself.⁷⁶ This has the practical effect that a responsible person, who could well be a volunteer, would be expected to fund a court challenge to their removal without the support of the registered entity.

The ACNC has requested specific powers to impose late lodgement penalties for annual financial reports.⁷⁷

In the first five years of operation the Commissioner has not tested the general powers exercisable over registered entities or those involved in their governance in the Commonwealth, State or Territory courts. Nor has the Commissioner tested any of the powers of the courts to make orders in relation to charitable assets available under common law, equity and State and Territory legislation. The ACNC has pointed to a lack of resources as a reason why powers might not have been exercised.⁷⁸ However, this could be due to the existence of other regulators that are better suited. The ACNC is one of many regulators with overlapping jurisdictions.

Our consideration of the issues

Responsible persons

The ACNC practice of describing people responsible for governance of a registered entity as 'responsible persons' is a practical approach and should be used in the ACNC Act by replacing the term

⁷³ ACNC website, Regulatory Approach Statement, viewed 30 May 2018, https://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/ACNC/Regulatory/Reg_approach.aspx?hkey=8251156f-f3c9-41bb-800a-304c2485be09.

⁷⁴ The Hon P A Bergin SC, 'Report of the Inquiry under the Charitable Fundraising Act 1991 into The Returned and Services League of Australia (New South Wales Branch), RSL Welfare and Benevolent Institution and RSL LifeCare Limited', January 2018.

⁷⁵ Submission, AICD, 28 February 2018.

⁷⁶ Subsections 100-10(10) and 100-15(7) of the ACNC Act.

⁷⁷ Submission, ACNC, received 19 January 2018, recommendation 34.

⁷⁸ Submission, ACNC, received 19 January 2018.

‘responsible entities’. This should be undertaken despite the fact that the ATO uses the term differently.

Powers

The Panel is supportive of the ACNC’s regulatory approach to exercise its powers to address the risks and evidence presented. The Panel agrees with the assumption that most registered entities and other charities are acting honestly and should be given the opportunity to address any concerns that may arise.

The Panel acknowledges that in the changing landscape of the sector, the ACNC needs to balance its compliance efforts with its educative approach. In this regard, the Panel is supportive of the need to take quick and responsive action against registered entities where blatant abuse of the ACNC Act is evident. However, the Panel does not believe that the powers or functions need to be extended to enable the Commissioner or delegated staff to take appropriate action.

In the future, cases may arise where there will be a need to act to protect charitable or other assets and ensure compliance with the law. As the Commissioner’s powers under the ACNC Act and the common law, in equity and under State and Territory legislation have not been tested in the first five years, it is difficult to know whether there are any gaps in powers.

In relation to the powers exercisable over FREs, the Panel agrees with the Senate Economics Legislation Committee statement that it is:

*inappropriate for there to be a Commonwealth charities regulator with the power to remove or suspend directors and trustee without court proceedings.*⁷⁹

The Panel is therefore of the view that there are aspects of the Commissioner’s powers which should be reduced, such as the power to replace a responsible person without court approval.

The Commissioner should not have additional powers nor be subject to less judicial scrutiny than other comparable regulators. A court should be able to consider afresh (a *de novo* review) any decision made by the Commissioner.

The Panel considers that the Commissioner does have the necessary powers to carry out the second and third objects.

A national scheme and the power to protect assets

The Panel considers that the only long-term solution to comprehensively protect charitable and other assets is a national scheme, commencing with States, Territories and government agencies responsible for aspects of asset protection conferring their powers on the Commissioner.

ACNC internal structure

The Panel considered the structure of other statutory organisations with either multiple commissioners and/or an executive committee:

- ASIC has a Chair and three Commissioners, including a Deputy Chair who are responsible for its functions, powers and strategic direction.⁸⁰
- The ACCC has a Chair, two Deputy Chairs and four Commissioners responsible for its administration.⁸¹

⁷⁹ Senate Economics Legislation Committee, Senate, Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 (June 2014), paragraph 2.66.

⁸⁰ ASIC website, viewed 24 May 2018, <https://asic.gov.au/about-asic/what-we-do/how-we-operate/asics-internal-governance/>

⁸¹ ACCC website, viewed 24 May 2018, <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/accc-chair-commissioners>

- The Australian Prudential Regulation Authority (APRA) has a full-time Executive Group of at least three and no more than five members responsible and accountable for its operation and performance.⁸²
- The ATO Executive Committee comprises the Commissioner, three Second Commissioners and executives who oversee the strategic direction and operations of the ATO.⁸³

The Panel considers that the ACNC should have an executive committee structure comprising the Commissioner and Assistant Commissioners responsible for the strategic direction and performance of the ACNC.

Delegations

It would be administratively efficient for the Commissioner to have broader delegation powers.

Protection of whistleblowers

The Panel's attention was drawn to the need to protect whistleblowers. Without appropriate protections in place, whistleblowers may be reluctant to approach the ACNC to disclose matters of concern.

The Panel is aware that the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 is currently before Parliament. The Bill addresses the majority of the recommendations made by the Parliamentary Joint Committee on Corporations and Financial Services' Report on *Whistleblower protections in the corporate, public and not-for-profit sectors*.⁸⁴ However, there are challenges.

*It is not clear that the Commonwealth could constitutionally cover non-corporate bodies, which include not only some charities but also partnerships, trusts and unincorporated associations. It might be possible to seek referral by the states of the appropriate power, or to use elements of the external affairs power.*⁸⁵

This is another area that demonstrates the need for a national scheme.

The Panel has recommended that amendments to the ACNC Act to protect whistleblowers be considered with other legislative amendments detailed in Appendix B.

Conclusions

For clarity, the ACNC Act should be amended to replace the term 'responsible entity' with 'responsible person'. This will ensure that the ACNC Act and the ACNC guidance material are consistent.

The Commissioner's powers are adequate and do not need to be increased. In relation to FREs, the powers of the Commissioner should not be any more than those of regulators overseeing other entities. In this regard, the powers of the Commissioner to replace a responsible person should be removed with the Commissioner only having the powers of comparable regulators.

Decisions and discretions of the Commissioner should be subject to judicial review afresh of all of the issues (a *de novo* review).

In chapter 14, the Panel recommends a national scheme for the regulation of charities and not-for-profits. Implementation of this recommendation would allow for nationally consistent powers to be exercised to protect charitable and other assets.

⁸² APRA website, viewed 24 May 2018, http://www.apra.gov.au/AboutAPRA/Documents/APRA_Organisational_Structure.pdf

⁸³ ATO website, viewed 24 May 2018, <https://www.ato.gov.au/About-ATO/About-us/Who-we-are/Executive-Committee/>

⁸⁴ Senate Economics and Legislation Committee report on Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, paragraph 1.11.

⁸⁵ Senate Economics and Legislation Committee report on Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, paragraph 3.6.

Best practice internal governance would be for the ACNC to establish an Executive Committee, comprising the Commissioner and the Assistant Commissioners, that is responsible and accountable for the strategic direction and performance of the ACNC.

The Commissioner should also be able to delegate functions or powers more broadly to ACNC staff.

In addition to the recommendations below, some additional changes to the ACNC Act mentioned in this chapter are set out in Appendix B.

Recommendation 4

The ACNC Act be amended to replace the term 'responsible entity' with 'responsible person'.

Recommendation 5

The powers of the Commissioner to replace a responsible person be removed.

Recommendation 6

An Executive Committee comprising the Commissioner and the Assistant Commissioners be established to be responsible for the strategic direction and performance of the ACNC.

Recommendation 7

The ACNC Act be amended to give the Commissioner broader powers to delegate functions or powers to staff.

4. Advisory Board

Introduction

The Advisory Board is established by section 135-5 of the ACNC Act, as separate from both the Commissioner and the ACNC, for the purpose of advising the Commissioner. The Advisory Board's function is, at the request of the Commissioner, to provide advice and make recommendations in relation to the Commissioner's functions under the ACNC Act.⁸⁶

The Advisory Board is appointed by the Minister and consists of up to eight 'general members' with expertise in the sector, law, taxation or accounting. The Advisory Board also currently consists of four 'ex-officio members' who are appointed to the Board because they are the holder of a specified office. General members are appointed for a term of up to three years and ex-officio members remain on the Board as long as they hold the specified office.⁸⁷

The Advisory Board is not a governance board. The governance of the ACNC falls solely on the Commissioner who holds responsibility for the ACNC, as well as the functions and powers conferred or imposed by the ACNC Act.

What we have heard

Submissions noted that sector confidence in the ACNC could be strengthened by ensuring that the Advisory Board convenes regularly and meets with the Commissioner and Assistant Commissioners to provide independent advice on matters concerning the operations of the ACNC. Meetings should not be dependent on a request of the Commissioner.⁸⁸

The Advisory Board, in its submission, suggested that consideration be given to allowing the Advisory Board to provide advice to the Minister.

.... There is value in assessing potential other benefits of the Advisory Board, and expressly considering the potential for the Advisory Board to also provide advice to the Minister on matters relating to the charity and not-for-profit sector.....⁸⁹

A small number of submissions suggested that appointments to the Advisory Board should be made on an independent basis.⁹⁰

Our consideration of the issues

Advisory Board members have significant skills, expertise and networks in relation to the sector and are appointed by the Commonwealth Government. There could be a clear public benefit in the Advisory Board advising not only the Commissioner but also the Minister, and interfacing with the sector. Its independence is important to the credibility of the ACNC.

Currently, the Advisory Board can only advise the Commissioner at the Commissioner's request. This limited role inhibits the Advisory Board's ability to raise issues, contribute to public policy and use its expertise to benefit the sector. The Advisory Board should be able to proactively raise issues and provide advice to the Commissioner.

The Advisory Board's role should also be extended to enable it to engage directly with the sector and provide independent advice to the Minister.

⁸⁶ Subsection 135-15(1) of the ACNC Act.

⁸⁷ Chapter 6 of the ACNC Act.

⁸⁸ Submission, ACFID, February 2018, page 11, recommendation 5.

⁸⁹ Submission, ACNC Advisory Board, 29 January 2018, page 5.

⁹⁰ For example, Submission, RSPCA, 28 February 2018; Submission, Community Council of Australia, received 27 February 2018; Submission, Refugee Council of Australia, received 28 February 2018.

As a comparison, the Board of Taxation is a non-statutory advisory body charged with contributing a business and community perspective on the design of taxation laws and their operation.⁹¹ Members are appointed by the Treasurer, on the basis of their expertise and experience. In addition, the Secretary of The Treasury, the Commissioner of Taxation and the First Parliamentary Counsel are members of the Board of Taxation.

The Board of Taxation's function is to provide advice to the Treasurer on:

- *the quality and effectiveness of tax legislation and the processes for its development, including the processes of community consultation and other aspects of tax design;*
- *improvements to the general integrity and functioning of the taxation system;*
- *research and other studies commissioned by the Board on topics approved or referred by the Treasurer; and*
- *other taxation matters referred to the Board by the Treasurer.*⁹²

An extension of the role of the ACNC Advisory Board to reflect functions similar to that of the Board of Taxation would benefit the sector.

The Advisory Board's interface with the sector could be through the existing ACNC consultation mechanisms of the Professional Users Group (PUG) and the Sector Users Group (SUG). PUG brings together professional advisers along with representatives of government agencies and SUG comprises invited representatives of registered entities and government agencies that interact with the sector. The role of PUG and SUG could be formalised into also meeting with the Advisory Board.

In respect of the appointment of Advisory Board members, the current process of appointment is appropriate.

The Advisory Board is not a governance board and the Panel does not propose any changes to this role.

Conclusions

The functions and powers of the Advisory Board should be amended to allow the Advisory Board to convene and review any matters under the ACNC Act.

The role of the Advisory Board should be extended to provide an interface with both the Minister and the sector. Engagement with the sector should be through regular meetings with PUG and SUG.

Recommendation 8

The Advisory Board be empowered to provide advice to the Minister or the Commissioner on its own initiative and engage directly with the sector.

⁹¹ Board of Taxation website, viewed 24 May 2018, <http://taxboard.gov.au/about/governance/>

⁹² Board of Taxation Charter, Board of Taxation website, viewed 29 May 2018, <http://taxboard.gov.au/about/governance/>

PART B – REGULATORY FRAMEWORK

5. Governance

Introduction

The concept of governance encompasses the rules, relationships, policies, systems and processes to ensure that authority within an organisation is exercised and maintained.⁹³

An effective governance framework should have regard to:

- the contribution of responsible persons;⁹⁴
- the effectiveness of the board;
- the way in which governance is applied throughout the organisation; and
- the strength of the relationships the organisation fosters with its stakeholders.⁹⁵

Good governance of registered entities is a critical element in enabling the ACNC to achieve its object of protecting and enhancing public trust and confidence in the sector.

Sources of governance requirements

The foundations for governance standards are in the common law and principles of equity. Prior to the enactment of the ACNC Act, governance requirements not only existed in the common law and equity, but also in Commonwealth, State and Territory legislation.

Following the introduction of the ACNC governance standards, the only governance requirements that were removed or ‘turned off’ were those imposed under the Corporations Act for companies limited by guarantee which were also registered under the ACNC Act. No other governance requirements were ‘turned off’, repealed or consolidated. As a consequence, the imposition of the ACNC governance standards on registered entities is a further layer of red tape for most registered entities.

There are also issues arising from the international nature of some registered entities. An entity from another country, such as a university or international charity, may be a registered entity in Australia, but subject to different governance requirements in their country of origin.

In addition to the statutory governance requirements, there are also voluntary codes that may apply, such as the Australian Institute of Company Directors (AICD) ‘Good Governance Principles and Guidance’, the Code of Governance for the Australian Community Sector, or the Australian Council for International Development (ACFID) ‘Code of Conduct’. Professional bodies that are registered entities also have codes of conduct which set governance requirements for their boards and those of their members.

ACNC governance standards

Duties for registered entities and indirectly for responsible persons (modelled on those set out in the Corporations Act) are set out in the *Australian Charities and Not-for-profits Commission Regulations 2013* (the ACNC Regulations).⁹⁶

⁹³ AICD website, viewed 30 May 2018, <http://aicd.companydirectors.com.au/resources/all-sectors/what-is-corporate-governance>.

⁹⁴ The persons responsible for the governance of registered entities are described in the ACNC Act as ‘responsible entities’. However, in its educational and explanatory material the ACNC describes the people responsible for the governance of charities as ‘responsible persons’. This Report generally uses the terminology of the ACNC in its educational and explanatory material (that is, responsible persons).

⁹⁵ AICD website, viewed 30 May 2018, <http://aicd.companydirectors.com.au/resources/all-sectors/what-is-corporate-governance>.

⁹⁶ Subdivision 45-B of the ACNC Regulations.

These governance standards are summarised as follows:

Governance Standard 1: Purposes and not-for-profit nature of a registered entity

Registered entities must be not-for-profit and work towards their charitable purpose. A charity must be able to demonstrate this to the ACNC and provide information about its purpose to the public (for example, by having a copy of its rules on the Register).

Governance Standard 2: Accountability to members

Charities must take reasonable steps to be accountable to their members and provide their members adequate opportunity to raise concerns about how the charity is governed. This standard only applies to charities that have members (not to trusts).

Governance Standard 3: Compliance with Australian laws

A charity must not commit a serious offence (such as fraud) under any Australian law or breach a law that may result in a civil penalty of 60 penalty units or more.

Governance Standard 4: Suitability of board members ('responsible persons')

Charities must take reasonable steps to ensure that their board members are not disqualified from managing a corporation (under the Corporations Act) or currently disqualified from being a board member of a registered charity by the ACNC Commissioner. Charities must take reasonable steps to remove board members who do not meet these requirements.

Governance Standard 5: Duties of board members ('responsible persons')

Charities must take reasonable steps to make sure that their board members know and understand their legal duties and that they carry out these duties in accordance with the standard.

The formulation of the ACNC governance standards requires the registered entity, not the individual, to take reasonable steps to ensure that its responsible persons (for example, its directors) are subject to, and comply with these duties. Responsible persons are not individually subject to any duties under the ACNC Regulations but similar duties may apply under applicable Commonwealth, State or Territory legislation or under the common law and principles of equity.

The ACNC has published a detailed description of what is required within the scope of each of the relevant governance standards. Each registered entity must comply with these standards (unless they are a BRC, regardless of the fact that the registered entity may also be subject to additional governance requirements).

Duties under the Corporations Act

Entities incorporated and registered under the Corporations Act are subject to a number of duties and other obligations. Section 111L of the Corporations Act purported to 'turn off' those duties and obligations for companies that were also registered under the ACNC Act, so that those companies and their directors were not subject to both the ACNC governance standards and the Corporations Act duties and obligations. However, there are different views on the interpretation of section 111L. Some suggest that section 111L has not turned off the Corporations Act duties and obligations in respect of individual directors. They argue it has only turned off the duties and obligations in relation to the company itself. This uncertainty in the application of section 111L compounds the confusion for the directors of those companies (that is, the responsible persons of those registered entities).

Responsible persons

There is no requirement under the ACNC Act for a registered entity to have a minimum number of responsible persons, or for any of the responsible persons to be resident in Australia.

Misconduct

The Terms of Reference require the Panel to consider whether:

- the powers of the Commissioner are the right powers to address the risk of misconduct by registered entities, or those that work with them, so as to maintain the public's trust and confidence in the sector; and
- greater transparency is required or if additional powers would be appropriate.

There is no doubt that cases of serious misconduct have a damaging impact on the trust and confidence in the sector as a whole, not necessarily just the registered entities involved. It is also clear from recent examples of misconduct relating to not-for-profits which were not registered entities that the potential for such misconduct to also damage the reputation of registered entities is high.

External conduct standards

Division 50 of the ACNC Act provides for external conduct standards (ECS). The object of Division 50 is to give the public confidence that activities of registered entities operating outside Australia, and funds sent outside Australia by registered entities, are legitimate and are not contributing to criminal activities. Accordingly, ECS serve a different purpose to the governance standards. No ECS have been made under the ACNC Act to date.

What we have heard

The Panel heard that there is currently some confusion in the way that the governance standards are written and that those standards should be clarified.

*As a matter of principle, the AICD would be supportive of charity directors' duties being expressed and applied as clear individual duties with consistent and clear expectations on charities of all types, within the regulatory framework of the ACNC.*⁹⁷

It has been stated that Standard 5 has introduced increased complexity to the obligations of registered charities and to the duties of individuals who are the responsible persons of those charities.⁹⁸

The LCA submission provided:

*That ss 180-183, and 191 (directors' duties and disclosure of interests) contained in the CA [Corporations Act 2001 (Cth)] be 'switched on' again. This will provide greater ability for members of a charity to bring an action to address inappropriate conduct by its responsible entities. It would also have the effect of ensuring that 'officers' as defined in the CA (who may not otherwise qualify as 'responsible entities' under the Act) are subjected to appropriate duties. It ought to be made clear that this is not intended to transfer regulation of charities back to ASIC.*⁹⁹

The LCA also submitted that the word 'perceived' should be deleted from governance standard 5, pointing out that the term is not 'clearly established in law' and is 'capable of varied interpretation'.¹⁰⁰

The ACNC submitted that it had 'identified certain areas where the 'turn off' provisions have created uncertainty for charitable companies', but it did not recommend changes.¹⁰¹

Concern was expressed that companies which are also registered entities are still subject to both Corporations Act and ACNC governance requirements because only some of the Corporations Act obligations are 'turned-off' by section 111L of the Corporations Act. For example, meetings of members require compliance with both the Corporations Act and the ACNC governance standards.¹⁰²

⁹⁷ Submission, AICD, 28 February 2018, page 4.

⁹⁸ Ramsay, I and Webster, M, (2017) *Registered Charities and Governance Standard 5: an Evaluation*, 45 ABLR 127 at 158.

⁹⁹ Submission, LCA, 28 February 2018, page 10.

¹⁰⁰ Submission, LCA, 28 February 2018, paragraph 19.

¹⁰¹ Submission, ACNC, received 19 January 2018, page 43.

¹⁰² Submission, Hannrick Curran, 27 February 2018, page 3.

In relation to the recently introduced 'safe harbour' mechanism within the insolvent trading provisions (section 588GA – Safe harbour - taking course of action reasonably likely to lead to better outcome for company and creditors), CPA Australia suggested:

*...that consideration be given to whether, or not, this relief designed to encourage business turnarounds is fair and reasonable in the charities and not-for-profit sectors and, as such, potentially 'turned off' via the section 111L mechanism.*¹⁰³

In relation to misconduct, the Panel heard from the ACNC and other regulators that the vast majority of the sector was focused on doing the right thing. The general view is that the ACNC's risk management approach to misconduct is appropriate, and that there does not appear to be significant or widespread risks which threaten public trust and confidence in the sector.

The Panel received submissions and feedback on specific areas of concern such as:

- related party dealings;
- remuneration practices;
- advocacy;
- the risk of charities and not-for-profits being used to fund terrorism related activities; and
- face-to-face fundraising methods.

These issues are discussed in more detail in other chapters of this Report.¹⁰⁴

In relation to the ECS, it was noted that the 'proposed development of External Conduct Standards could be a valuable contribution to the integrity and transparency of organisations sending funds overseas.'¹⁰⁵

Our consideration of the issues

The Panel heard that the current system of different governance requirements is complex and confusing. It is unreasonable to expect volunteer directors working in the sector to understand and comply with multiple jurisdictional and sometimes inconsistent governance requirements.

While there are common themes across the competing governance requirements, such as duties to act honestly and avoid conflicts, the expression of those duties differs between them and imposes an unacceptable level of red tape.

Clarification of the ACNC governance standards

Governance Standards 1 and 2

Governance standards 1 and 2 could be improved, but for present purposes are adequate in expressing duties and the requirement that registered entities pursue their purpose. The Panel considers these standards to be appropriate and do not require amendment.

Governance Standard 3

Governance standard 3 is not appropriate as a governance standard. Registered entities must comply with all applicable laws. It is not the function of the ACNC to force registered entities to enquire whether they may or may not have committed an offence (unrelated to the ACNC's regulatory obligations), advise the Commissioner of that offence and for the ACNC to advise the relevant authority regarding the offence.

¹⁰³ Submission, CPA Australia, 28 February 2018, page 4.

¹⁰⁴ See chapter 6, chapter 9, chapter 10 and chapter 12.

¹⁰⁵ Supplementary submission, Compassion Australia, 8 May 2018, page 2.

Governance Standard 4

Guidance could be provided in relation to governance standard 4. However, the Panel considers that the standard does not need to be amended at this time.

Governance Standard 5

The Panel considers that the word ‘perceived’ should be removed from ACNC Regulation 45.25.¹⁰⁶ This would address the most obvious concerns raised in submissions and consultations.

Clarifying the applicable governance requirements

It is the Panel’s view that the ACNC governance standards should operate to the extent there is not already another comparable governance framework with which a registered entity is bound to comply.

While the governance standards are considered ‘minimum requirements’, they are effectively an overlay that needs to be complied with in addition to other requirements. The Panel is not persuaded that the governance standards should ‘override’ specific tailored governance requirements.

A better outcome would be for a registered entity to be presumed compliant with the ACNC governance standards if it makes such a declaration in the AIS. This would lead to a reduction of red tape by reducing the compliance burden on registered entities in dealing with potentially competing sets of governance requirements. If the ACNC has reasons for concern, it may use its powers to make further inquiries.¹⁰⁷

Director’s duties under the Corporations Act

It is not clear that, in the case of a registered entity incorporated under the Corporations Act, an individual director’s duties under the Corporations Act have been effectively ‘turned off’. The Panel also acknowledges that ultimately directors are still subject to common law and equitable duties. The Corporations Act specifically notes that the duties of directors in the Corporations Act do not replace common law and equitable duties.¹⁰⁸

The Panel accepts the submission of the LCA that it would be preferable to ‘turn on’ the director’s duties under the Corporations Act to resolve the ambiguity in relation to the provisions. This would clarify not only the rights and obligations of directors of companies registered under the Corporations Act that are also registered entities but it would also clarify the right of others to take action against those directors.

Further, turning the duties back on is consistent with allowing other governance requirements to continue to apply until a national scheme is implemented.

Responsible persons

The most critical matter in relation to the appointment of responsible persons is the capability and suitability of the person for the role. Best practice governance would suggest that the most effective boards have between six to eight members with a diverse range of skills and experience. However, best practice and mandated minimum standards are quite different.

The Panel was not convinced that mandating a minimum number of responsible persons would address governance concerns. The Panel notes that under the Corporations Act, proprietary companies must have at least one director who must ordinarily reside in Australia, and public companies must have at least three directors, two of whom must ordinarily reside in Australia.¹⁰⁹ The Panel considers that mandating registered entities to have additional responsible persons would be

¹⁰⁶ Regulation 45.25(2)(e) of the ACNC Regulations.

¹⁰⁷ Subdivision 60-E of the ACNC Act.

¹⁰⁸ Section 185 of the Corporations Act.

¹⁰⁹ Section 201A of the Corporations Act.

an extra level of red tape and is inconsistent with what applies in other sectors. The Panel does not consider that it is necessary, at this time, to require responsible persons to ordinarily reside in Australia.

Misconduct

Recent inquiries¹¹⁰ have highlighted the important enforcement role of the regulator in relation to misconduct. The Royal Commission has revealed evidence of what is called ‘regulatory capture’ in the financial sector. This term refers to the cognitive capture of regulators by the regulated where the regulator has effectively internalised the objectives, concerns, world view and fears of the financial community’ rather than looking at the objectives of society as a whole.

The issue of regulatory capture highlights the importance of the independence of the ACNC, the Commissioner and the Advisory Board in relation to the sector. It also indicates that the Commissioner, where appropriate, should use the regulatory powers in the ACNC Act to enforce the prescribed law in relation to misconduct and disqualifying purposes.

While the Panel considers misconduct to be a matter of governance, the Panel does not consider any additional amendments to the ACNC governance standards are required. The ACNC’s approach to misconduct by registered entities and their responsible persons appears to be appropriate.

Transitional arrangements

There should be a timely transition to the recommended changes in governance requirements for deemed compliance. Registered entities should be given a transition period of at least 12 months.

Conclusions

The only appropriate long-term solution to achieve consistency in relation to the governance of registered entities is to implement a national scheme. This is discussed further in chapter 14.

In the interim, the Panel recommends that, in respect of the governance standards, the following be immediately implemented:

- Standard 1 be retained.
- Standard 2 be retained.
- Standard 3 be repealed.
- Standard 4 be retained.
- Standard 5 be retained but the regulation be amended to remove the word ‘perceived’ with respect to conflict of interest.

To avoid duplication and reduce red tape, a registered entity should be deemed to be in compliance with the governance standards if it already applies a separate set of governance standards which meet minimum requirements. The registered entity should be presumed to be compliant with the ACNC governance standards by making a declaration in the AIS.

Director’s duties and other provisions ‘turned off’ under section 111L of the Corporations Act should be ‘turned on’ to resolve ambiguity in relation to the application of the Corporations Act provisions to companies registered under the ACNC Act and their directors and officers.

¹¹⁰ For example, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

In addition to the recommendations below, some additional changes to the ACNC Act are set out in Appendix B.

Recommendation 9

ACNC governance standard 3 be repealed and governance standard 5 amended to remove the word 'perceived' with a view to consistency with the Corporations Act.

Recommendation 10

A registered entity be presumed to comply with the ACNC governance standards if it already complies with other comparable governance requirements.

Recommendation 11

The *Corporations Act 2001* (Cth) be amended to 'turn on' the duties and other provisions previously 'turned off'.

6. Reporting and Proportionality

Introduction

Division 60 of the ACNC Act sets out the reporting obligations for registered entities and those obligations are proportional to the size of the registered entity (small, medium or large) determined on the basis of annual revenue.¹¹¹

The information required to be reported by registered entities must be information that relates to, or has the purpose of, enabling recognised assessment activities to be carried out in relation to those entities.¹¹² Section 15-10(e) of the ACNC Act also requires the Commissioner, in performing his or her functions and exercising his or her powers, to have regard to the three principles of regulatory necessity, reflecting risk and proportionate regulation.

Thresholds to determine size

The thresholds that determine whether a registered entity is considered small, medium or large are set out in section 205-25 of the ACNC Act and can be varied by regulation. The current thresholds are based on annual revenue. The term ‘revenue’ is not defined in the ACNC Act but is to be calculated in accordance with accounting standards in force at the relevant time (even if the standards do not otherwise apply to the financial year of the registered entity).¹¹³

Table 1: Current thresholds and minimum reporting requirements

Entity size	Annual revenue	Minimum reporting requirements	Current number of reporting entities
Small	less than \$250,000	AIS	31,327
Medium	\$250,000 or more and less than \$1 million	AIS and a financial report which may be reviewed or audited	7,471
Large	\$1 million or more	AIS and audited financial report	8,293

Notes:

- Section 60-60 of the ACNC Act provides that the minimum reporting requirements in subdivision 60-C of the ACNC Act do not apply to a BRC. However, the subdivision does apply to a BRC if the BRC voluntarily gives the Commissioner a financial report for the year. Accordingly, BRCs irrespective of size, are only required to lodge an AIS but without financial information. However, a small number of BRCs voluntarily provide financial information and annual financial reports. See chapter 7 for further information and recommendations in relation to BRCs.
- These figures are based on the 2016 AISs lodged as at 21 September 2017 per the ‘Reporting trends in 2016 Annual Information Statement’ released by the ACNC in November 2017. The figures include 8,188 BRCs which are not required to submit financial information in their AIS.
- An AIS includes basic information about a registered entity including its activities, number of employees and volunteers and (except for BRCs) summary financial information. An AIS can be completed online on the ACNC website by logging into the Charity Portal.
- A review only provides limited assurance (comfort). The reviewer states that they do not know of anything to suggest a registered entity’s annual financial report is not compliant with the

¹¹¹ Section 60-3(3) of the ACNC Act.

¹¹² Sections 60-5(3) and 60-15(2) of the ACNC Act.

¹¹³ Section 205-25(4) of the ACNC Act.

requirements of the ACNC Act. A review is a lower level of assurance than an audit. An audit is a direct opinion as to whether an entity's annual financial report meets the requirements of the ACNC Act.¹¹⁴

Neither the second reading speech nor the Revised Explanatory Memorandum to the ACNC Bill and ACNC (C&T) Bill (Revised Explanatory Memorandum) explain how the current thresholds were determined, except to note that the purpose of the thresholds was to minimise the compliance burden placed on registered entities.¹¹⁵ Chapter 2 of the House of Representatives Standing Committee on Economics' report includes an analysis of the thresholds, noting that the Committee received submissions stating that the thresholds were too low to be meaningful.¹¹⁶

The ACNC noted in its submission that the thresholds were drawn from the Corporations Act for consistency.¹¹⁷ The ACNC also advised that some State and Territory reporting regimes use similar thresholds for reporting by not-for-profits.

In addition to minimum reporting requirements, the Commissioner can require a registered entity, or a class of registered entities, to provide further information and/or prepare an additional report.¹¹⁸ BRCs are not exempt from these requirements.

Current financial reporting requirements

The current financial reporting requirements are based on entity size. The nature of the financial reporting required, and the basis upon which financial reports are to be prepared, varies according to whether a registered entity is classed as small, medium or large.

Small registered entities may use either cash or accrual accounting in reporting to the ACNC if they do not otherwise use accrual accounting (for example, if compelled to do so under their governing documents or by another government agency). Medium and large registered entities are required to use accrual accounting in their annual financial reports.¹¹⁹

All registered entities are required to lodge an AIS which includes summary financial information.¹²⁰

The pro-forma AIS prepared by the ACNC contains a simplified income statement and a simplified balance sheet. The simplified balance sheet requires registered entities to provide the amount of their total assets and total liabilities. As the requirement for small registered entities to provide this financial information is inconsistent with them having an option to use cash accounting (i.e. they do not prepare a balance sheet setting out assets or liabilities) they can enter zero as the amount of their total assets and total liabilities. This practice raises a question as to the accuracy of aggregate information derived from the values provided in a simplified balance sheet by small registered entities which use cash accounting.¹²¹

Small registered entities are not required to lodge an annual financial report with the ACNC. However, the ACNC encourages small registered entities that prepare reviewed or audited annual financial

¹¹⁴ Sections 60-30(3) and (4) of the ACNC Act. See also ACNC website, viewed 7 May 2018, <http://www.acnc.gov.au/ACNC/Manage/Reporting/ReviewAudit/ACNC/Report/ReviewAudit.aspx?hkey=1a656b65-e48f-430a-904e-581a26fa2980>.

¹¹⁵ Revised Explanatory Memorandum to the ACNC Bills, paragraph 6.23.

¹¹⁶ House of Representatives Standing Committee on Economics, Report on the *Australian charities and Not-for-profits Commission Bill 2012*, August 2012, page 51.

¹¹⁷ Submission, ACNC, 19 January 2018, page 50.

¹¹⁸ Subdivision 60-E of the ACNC Act.

¹¹⁹ ACNC website, viewed 7 May 2018, <http://www.acnc.gov.au/ACNC/Manage/Reporting/CashAccrual/ACNC/Report/CashAccrual.aspx>. As BRCs are not required to include summary financial information in their AIS, no method of accounting is prescribed for BRCs.

¹²⁰ BRCs, irrespective of size, are not required to provide summary financial information.

¹²¹ It was suggested to the Panel that it was preferable to have some balance sheet data from small registered entities which use cash accounting, even if the quality of that data was known to be poor and unreliable. In other words, some data was better than none. The Panel questions this view having regard to what was heard about the significant use of ACNC data in sector analysis and submissions to government. In other words, poor data, poor analysis and poor submissions.

statements in accordance with accounting standards for other reasons to voluntarily lodge an annual financial report with the ACNC.

Medium and large registered entities must lodge an annual financial report consisting of:

- the registered entity's financial statements for the year;
- the notes to the financial statements; and
- a prescribed declaration about the statements and notes.

The type of financial statements which must be prepared is determined by accounting standards: special purpose financial statements, general purpose financial statements or general purpose financial statements prepared under the reduced disclosure regime. A medium registered entity can choose whether its financial statements are reviewed or audited, whereas a large registered entity must have its financial statements audited.

An annual financial report must comply with accounting standards, unless the ACNC Regulations prescribe otherwise. A review or an audit must be undertaken in accordance with auditing standards.¹²²

Joint and collective reporting

The Commissioner may allow two or more registered entities (reporting group) to prepare and lodge a single information statement, or a single information statement and a single financial report, in relation to the reporting group for a financial year (joint reporting).

In addition, under section 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). Collective reporting is the reporting by two or more affiliated registered entities based on their common functions, activities or purposes rather than on an entity-by-entity basis.

In its submission, the ACNC noted that, to the date of its submission, it had not received any requests to allow collective reporting.¹²³ The ACNC considered that the benefits of collective reporting are unclear and recommended the repeal of subsection 60-95(2) of the ACNC Act.¹²⁴

What we have heard

Appropriateness of the current thresholds

Submissions noted that it is not clear why the current thresholds for reporting were chosen, on what basis they were chosen or when they should be revised. It was submitted that the appropriateness of the current thresholds should be reconsidered given the passage of time and the development of data on entity sizes.

The Panel also received submissions that stated that the thresholds are not fit for purpose:

*The current tiers are inadequate for delineation according to financial risk and the tier into which a charity falls does not impact its responsibilities with regard to the governance principles.*¹²⁵

For the most part, stakeholders commenting on the current thresholds were of the view that they needed to be increased based on a cost benefit analysis, balancing the costs of obtaining a review or audit against the benefit to those who rely on annual financial reports.

¹²² Section 60-35 of the ACNC Act.

¹²³ Submission, ACNC, received 19 January 2018.

¹²⁴ Submission, ACNC, received 19 January 2018.

¹²⁵ Submission, Professor David Gilchrist, 28 February 2018, page 3.

Justice Connect noted that the level of transparency required of a registered entity should be proportional to its size. Importantly, before any additional information is collected, consideration should be given to the need for such information, especially where this would place a burden on small registered entities.¹²⁶

Other stakeholders noted that the notion of tiered reporting has been highly successful, yet the thresholds did not seem to reflect the current structure of entities registered under the ACNC Act and should therefore be reviewed.

CPA Australia recommends the current thresholds for financial reporting by charities are reviewed and raised to a suitable level based on objectives and a clear criteria to do so. The role of economic significance and public interest continue to remain relevant, and any new thresholds to be set for financial reporting should, whilst removing any unnecessary regulatory burden on charities, ensure they continue to remain transparent and publicly accountable.¹²⁷

The submission from the Australian Accounting Standards Board (AASB) summarised feedback from six outreach sessions and suggested the financial reporting framework should:

- be based on consistent, clear and objective criteria and thresholds that support transparency and openness;
- specify financial reporting requirements based on needs of users matched with the level of public interest and external users (proportionate and fair); and
- provide for an appropriate level of assurance matched with the needs of users.

While the sessions hosted by the AASB considered the reasons why registered entities should provide financial reports and supported objective thresholds, there was no agreement on the basis for determining thresholds or where to draw new thresholds.¹²⁸

Changing the thresholds

Some stakeholders made suggestions to the Panel as to where new thresholds should be set to determine the size of registered entities. These included the creation of a new tier for extra-small entities. However, there was a wide divergence of views as to the appropriate level for the thresholds to determine what constitutes an extra-small, small, medium or large entity ranging from:

- annual revenue of less than amounts between \$50,000 and \$1 million for extra-small entities if a new extra-small tier was established;
- annual revenue of less than amounts between \$500,000 and \$5 million for small entities if a new extra-small tier was not established; and
- annual revenue of more than amounts between \$2.5 million and \$15 million for large entities.

In the November 2017 AASB Discussion Paper 'Improving Financial Reporting for Australian Charities' it was noted that 53 percent of registered entities by number have annual revenue of less than \$50,000; 71 percent of registered entities have annual revenue of less than \$250,000 and only three percent of registered entities have annual revenue of more than \$10 million.¹²⁹

HLB Mann Judd, drawing on the AASB Discussion Paper, also raised the desirability of a basis for the thresholds, so that the thresholds can be adjusted over time to cover inflation – for example, if the lowest threshold is set at an amount which covers 70 percent of registered entities by number, and

¹²⁶ Submission, Justice Connect, received 28 February 2018.

¹²⁷ Submission, CPA Australia, 28 February 2018, page 8.

¹²⁸ See the tables in the submission from the AASB, 28 February 2018, pages 11 and 12, for further information on the diversity of views expressed regarding four questions posed during the sessions: what are the key issues for charities in the current framework, what should be the criteria for assessing a good financial reporting framework, which charities should be reporting and what is the appropriate number of tiers and what should each of those tiers report?

¹²⁹ AASB (2017), *Improving Financial Reporting for Australian Charities*, figure 2 page 27.

the highest threshold is set to cover the top five percent of registered entities, these bases can remain and be used to adjust thresholds in the future.¹³⁰

Some stakeholders suggested that although the ACNC has thresholds for financial reporting based on revenue, this may not be a sufficient measure, as in some years a registered entity might have low revenue but still be significant in terms of public interest. Some considered that a mix of revenue, expenses, assets and/or the number of full time employees should be used to determine entity size (and levels of financial reporting).

The ACNC also advised the Panel of the progress made in discussions with the States and Territories in aligning the reporting thresholds in their legislation with the ACNC reporting thresholds and noted that any changes to the current ACNC reporting thresholds may adversely impact further progress in this red tape reduction initiative.

Finally, the submission from the ACNC suggested a more flexible approach could be desirable and recommended that the Panel consider whether registered entities should be able to self-assess their size for reporting purposes in a reporting period taking into account the immediately previous reporting period or, in the case of newly established entities, the projected revenue for the following reporting period.¹³¹

Our consideration of the issues

The Panel agrees with the many stakeholders that are of the view that the thresholds need to be revised. The current thresholds are placing an unnecessarily high regulatory burden on too many registered entities. The current thresholds have promoted an increase in regulatory obligations for many small and medium registered entities, rather than a reduction of red tape.

The principles of regulatory necessity, reflecting risk and proportionate regulation all support a change in the thresholds to reduce unnecessary financial reporting and other obligations being imposed on registered entities. The focus of financial reporting and risk assessment should be on large registered entities.

The Panel also supports a risk-based approach to regulation which would help to ensure the resources of the ACNC are applied where they are likely to have the most impact.

Clearly, such a tier system [with increased thresholds] would significantly reduce the reporting requirements of over 80 percent of charities and allow the ACNC to focus its supervisory and regulatory activities where [there is] higher risk, as determined by the level of economic activity.¹³²

All entities registered under the ACNC Act should be providing a minimum level of reporting in their AIS. However, the collection of the information required in, and the completion of, an AIS should not be onerous for any entity (particularly a small entity reliant on volunteer time).

Revising the thresholds

The thresholds need to be revised and in doing so there is scope to provide greater simplicity and clarity for users. Increasing the thresholds will better serve registered entities and the wider sector. It will make for a more robust sector going forward.

Increasing the thresholds will reduce red tape for some medium registered entities that are currently preparing reviewed or audited annual financial reports simply because they are registered under the ACNC Act. The Panel considers that these requirements are burdensome on some medium registered entities with low risk.

¹³⁰ Submission, HLB Mann Judd, 28 February 2018, page 6.

¹³¹ Submission, ACNC, received 19 January 2018, page 51.

¹³² Submission, Professor David Gilchrist, 28 February 2018, page 4.

Similarly, increasing the thresholds will reduce red tape for some large registered entities that are currently required to obtain an external audit of their annual financial reports simply because they are registered under the ACNC Act. An external audit can be costly for a registered entity which is not otherwise compelled to have its annual financial statements audited.

Where an entity does not otherwise prepare annual financial statements in accordance with accounting standards and have them reviewed or audited (for example, if not compelled under their governing documents or by another government agency to do so) then the ACNC should only compel the entity to do so where the economic size of the entity justifies such a requirement.

It is clear that there is a significant distance between the organisational character of charities with the highest and lowest revenues across jurisdictions, and as such, there may be scope to consider whether the public's expectation of the regulatory framework for a small local landcare group should be akin to that of a multi-billion dollar university. Clearly there are broader regulatory systems which may apply to the functional activities of larger organisations, however there remains a question about the suitability of the regulation of their governance systems.¹³³

However, the Panel notes that setting new thresholds requires careful consideration to ensure that appropriate transparency is not compromised.

When considering new thresholds, the Panel considered what factors should determine the thresholds. Some of the factors put to the Panel included revenue, expenses, assets and/or the number of employees.

Basing thresholds on assets would create costs for registered entities, particularly small registered entities, by requiring the valuation of assets in accordance with accounting standards. This would be inconsistent with reducing the regulatory burden for the sector.

While the number of full-time employees can be a good indication of the size of an entity, as a sole determining factor, employee levels do not reflect the number of volunteers and could skew the determination, resulting in registered entities falling into the wrong category. The Panel also queried whether the number of full-time employees added significantly to a revenue measure, since generally an entity's revenue would need to be sufficient to pay the salaries and on-costs for such employees.

The Panel also considered thresholds provided under other Commonwealth legislation to distinguish between small and large entities. Small business is defined differently depending on the applicable legislation. For example:

- the accounting requirements imposed on a proprietary company under *the Corporations Act 2001* (Cth) use a mixture of revenue, assets and employees;¹³⁴
- the Australian Bureau of Statistics (ABS) defines a small business as a business employing less than 20 people. Fair Work Australia defines a small business as one that has less than 15 employees whether full or part time;¹³⁵
- for Australian tax purposes an entity can be a small business entity if it has aggregated turnover (excluding GST) of less than \$10 million;¹³⁶ and
- some (small) businesses with an annual turnover of \$3 million or less are not required to comply with the *Privacy Act 1988* (Cth).¹³⁷

¹³³ Submission, ACT Government, 28 February 2018, page 4.

¹³⁴ A company is classified as small for a financial year if it satisfies at least two of the following tests (i) gross operating revenue of less than \$25 million for the year, (ii) gross assets of less than \$10 million at the end of the year, and (iii) fewer than 50 employees at the end of the year. Section 1.5.10 of the Corporations Act.

¹³⁵ ABS website, viewed 7 May 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1321.0>. Section 23 of *Fair Work Act 2009*.

¹³⁶ ATO website, viewed 7 May 2018, <https://www.ato.gov.au/business/small-business-entity-concessions/eligibility/>.

¹³⁷ Office of the Australian Information Commissioner website, viewed 7 May 2018, <https://www.oaic.gov.au/agencies-and-organisations/faqs-for-agencies-orgs/businesses/small-business>.

In the end, the Panel concludes that revenue remains the most appropriate basis for the thresholds. Revenue is easy to measure and least likely to be manipulated.

Reporting requirements for charities should be based on the relative risk those charities represent in the context of financial losses that may be visited upon stakeholders of these organisations and the prospects that a particular charity is not pursuing its mission in support of which an organisation's taxation status is granted.' Economic activity levels remain a logical proxy for risk assessment as economic activity is measured in some way by all charities; timely; relatively less complex than other measurement types; readily understood by the regulator; and allows for the delineation of charities into sub-groups for more focused analysis and prioritisation.¹³⁸

In considering revenue thresholds, the Panel was provided with the following data by the ACNC based on the financial information in the 2016 AISs lodged with the ACNC.¹³⁹ Table 2 sets out three scenarios and shows the impact of changing the annual revenue thresholds on the number of registered entities in each tier.

Table 2: Impact of changing the thresholds

Scenario 1	Number of reporting entities (2016)	Percentage
Small: annual revenue less than \$1 million	32,746	80.0
Medium: annual revenue \$1 million or more and less than \$3 million	3,642	8.9
Large: annual revenue of \$3 million or more	4,523	11.1
Scenario 2	Number of reporting entities (2016)	Percentage
Small: annual revenue less than \$1 million	32,746	80.0
Medium: annual revenue \$1 million or more and less than \$5 million	5,007	12.2
Large: annual revenue of \$5 million or more	3,158	7.8
Scenario 3	Number of reporting entities (2016)	Percentage
Small: annual revenue less than \$405,000	28,638	70.0
Medium: annual revenue \$405,000 or more and less than \$9 million	10,228	25.0
Large: annual revenue of \$9 million or more	2,045	5.0

Proposed thresholds

In assessing the wide range of submissions and material provided during consultations, the Panel:

- was not persuaded that establishing a new extra-small tier was necessary;

¹³⁸ Submission, Professor David Gilchrist, 28 February 2018, page 3.

¹³⁹ The 2017 AISs lodged have not been used as the ACNC has only received a subset of 2017 AIS returns to date. The analysis is based on the financial information contained in 40,911 AISs lodged by registered entities in 2016. There were 8,065 BRCs that did not submit financial information in their AIS and have been excluded from the analysis. However, 282 BRCs voluntarily submitted financial information in their AIS and that information has been included in the analysis. In addition, registered entities that report via a group have been excluded from the analysis.

- considers that reasonable new thresholds for determining entity size and the minimum reporting requirements are those set out in Table 3 below;
- proposes that to accommodate short-term variances in revenue, a rolling three year average of annual revenue be used to determine size for all registered entities; and
- suggests that when the thresholds are next reviewed, the following be used as a guide: the lowest tier threshold is set at an amount which covers at least 80 percent of registered entities by number, and the highest tier is set to cover the top five percent of registered entities by number.

Table 3: Proposed new thresholds

Entity size	Current annual revenue threshold	Percentage of reporting entities (2016) ¹⁴⁰	Proposed annual revenue threshold	Proposed percentage of reporting entities ¹⁴¹
Small	less than \$250,000	66.5	less than \$1 million	80.0
Medium	\$250,000 or more and less than \$1 million	15.9	\$1 million or more and less than \$5 million	12.2
Large	\$1 million or more	17.6	more than \$5 million	7.8

In assessing the new thresholds proposed by the Panel, it is important to note that if concerns or questions arise regarding the financial affairs of a registered entity, the Commissioner can exercise his or her powers under Division 60-E of the ACNC Act to require a registered entity to provide further information and/or prepare an additional report.

Changes to financial reporting requirements

If the thresholds are changed as proposed, the Panel does not believe there needs to be significant changes to the minimum reporting requirements applicable to small, medium and large registered entities. In other words:

- small registered entities would continue to provide an AIS annually;
- medium registered entities would continue to provide an AIS and a financial report which may be reviewed or audited; and
- large registered entities would continue to provide an AIS and an audited financial report annually.

A significant number of registered entities would ‘drop down’ a tier and accordingly the regulatory burden for those entities would be reduced.

In the case of small registered entities, the inconsistency between having an option to use cash accounting and being required to provide a simplified balance sheet should be addressed. The Panel considers that small registered entities should have the option to provide either a simplified balance sheet in its AIS (if it uses accrual accounting and prepares a balance sheet that complies with accounting standards) or a statement of resources.

¹⁴⁰ These figures are based on the 2016 AIS submissions as at 21 September 2017 per the *Reporting trends in 2016 Annual Information Statement* released by the ACNC in November 2017. See table 1 earlier in this chapter.

¹⁴¹ See Table 2 earlier in this chapter.

The proposed statement of resources would require a description of the assets used by the small registered entity to be provided in an AIS.¹⁴² Valuations would only be required to be attributed to those assets where valuations were practicable to obtain without unnecessary cost or were otherwise readily and easily ascertained. For example, the value of a small registered entity's cash resources and any marketable securities can be easily and readily ascertained and should be set out in the proposed statement of resources. By way of contrast, it may be difficult to obtain a valuation in accordance with accounting standards for a heritage listed building used by a small registered entity without the entity incurring unnecessary cost.

Small registered entities which otherwise prepare reviewed or audited annual financial statements in accordance with accounting standards, and medium registered entities which otherwise have their annual financial statements audited, should be required to lodge those annual financial reports with the ACNC. In other words, such lodgement should be required rather than voluntary. This approach is consistent with the Panel's goal that small and medium registered entities should not be required to prepare such annual financial reports solely by virtue of being registered under the ACNC Act. It is also consistent with ensuring that transparency is enhanced where doing so does not result in an onerous or unnecessary regulatory burden.

Transitional arrangements

There should be a timely transition to the new thresholds. Registered entities should be given notice that the thresholds take effect from financial years beginning on or after 1 July 2019.

Other changes to the financial reporting framework and accounting standards

The Panel has been greatly assisted by submissions from the AASB, Auditing and Assurance Standards Board (AUASB), Australian Not-for-Profit Accountants Network, Chartered Accountants Australia and New Zealand (CA ANZ), CPA Australia, Institute of Public Accountants, accounting firms and other accounting professionals and academics. These submissions raised issues regarding the financial reporting framework for registered entities which were either outside the Terms of Reference or raise issues which were not able to be adequately considered by the Panel in the time available.

The AASB advised the Panel that the International Accounting Standards Board (IASB) issued a revised Conceptual Framework on 28 March 2018 which includes a definition of 'reporting entity' that conflicts with the reporting entity concept used in accounting standards. The AASB has released a Consultation Paper¹⁴³ addressing the revised Conceptual Framework in Australia and the possible consequences of its adoption (for example, removal of special purpose financial statements) for, among others, registered entities that will be affected.

The Panel suggests further work be undertaken by the ACNC, AASB and AUASB, in consultation with the sector and other stakeholders, to consider further changes to the financial reporting framework for registered entities.

Those changes could include but are not limited to:

- the possible removal of references to 'special purpose financial statements' from the ACNC Act;
- potential reporting in relation to fundraising and administration costs;
- potential reporting in relation to service/social performance;

¹⁴² The proposed statement of resources would have some similarities with the performance report that may be used in New Zealand for reporting by small (Tier 4) New Zealand not-for-profit entities. The New Zealand Accounting Standards Board has published guidance on the content of the optional performance report – see Explanatory Guide 6 (EG A6) Optional Template and associated Guidance Notes for applying Public Benefit Entity Simple Format Reporting – Cash (Not-For-Profit) available online, viewed 10 May 2018, <https://www.xrb.govt.nz/accounting-standards/explanatory-guides/>

¹⁴³ AASB Consultation Paper: *Applying the IASB's Revised Conceptual Framework and Solving the Reporting Entity and Special Purpose Financial Statement Problems*, ITC39, May 2018.

- any necessary or desirable changes to, or clarifications regarding, the definition of ‘related party’ in the context of the sector (discussed below); and
- guidelines for the disclosure of remuneration paid to members of the governing board of a registered entity (i.e. responsible persons) and senior executives (discussed below).

Any proposed changes which would impose a further regulatory burden on registered entities will need to be carefully assessed having regard to the three principles of regulatory necessity, reflecting risk and proportionate regulation.

Related party transactions

Currently only registered entities preparing general purpose financial reports are required to comply with the accounting standard on related party disclosures (AASB 124 Related Party Disclosures).¹⁴⁴ The submission from CA ANZ noted:

*Inappropriate transactions with related parties are a key risk in relation to charities misusing funds for private benefit. We believe that it is in the public interest for all charities to disclose related party information, regardless of their size or reporting entity status.*¹⁴⁵

The submission from the AICD noted:

*... the AICD considers that public trust and confidence in the sector can be eroded by the application of charitable resources for private benefit. One of the common ways through which private benefit occurs is through improper related party transactions. Charities that self-assess as non-reporting entities are not subject to mandatory reporting requirements for related party disclosures in the financial report through AASB 124 Related Party Disclosure. Generally, charities that self-assess as non-reporting entities and prepare special purpose financial reports do not voluntarily adopt this related party standard. The AICD would support amendment to the regulations to require all charities to comply with AASB 124 and disclose related party transactions, regardless of whether or not the charity is a reporting entity. This feature is already in place for other accounting standards, such as compliance with AASB 101 Presentation of financial statements. For small charities that do not prepare financial reports, we recommend that a facility for disclosing related party transactions should be provided in the ACNC Annual Information Statement.*¹⁴⁶

Similar concerns and comments were regularly raised in the consultations conducted by the Panel. In this context, the submission from the ACNC noted (among other matters):

- 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’;
- In 2016 the ACNC introduced additional questions in the AIS to ask whether registered entities had related party transactions and whether registered entities had documented policies and processes for related party transactions;
- the revised Conceptual Framework issued by the IASB on 28 March 2018 (see above); and
- that AASB 124 should, at a minimum, apply in relation to a registered entity that is preparing a special purpose financial statement.

The Panel supports the approach adopted by the ACNC and considers that all registered entities should be required to disclose related party transactions in their AIS and that all medium and large entities be required to comply with AASB 124 – Related Party Disclosures in their annual financial reports

¹⁴⁴ AASB 124 – Related Party Disclosures is not one of the specified standards for special purpose financial statements prepared by registered entities.

¹⁴⁵ Submission, CA ANZ, 27 February 2018, page 2.

¹⁴⁶ Submission, AICD, 28 February 2018, page 7.

irrespective of whether the registered entity is otherwise required to comply with AASB 124 (for example, entities which only prepare special purpose financial statements).

If the disclosures by a registered entity give rise to concerns or questions, the Commissioner can exercise his or her powers under Division 60-E of the ACNC Act to require the registered entity to provide further information and/or prepare an additional report.

Disclosure of remuneration

A specific concern was raised in consultations regarding transparency of the remuneration paid to responsible persons¹⁴⁷ and senior executives. Some stakeholders questioned whether there should be an obligation on directors and the executive to disclose remuneration that is broadly aligned with disclosing entities under the Corporations Act¹⁴⁸ to provide greater accountability to donors, beneficiaries and the public. Remuneration reporting for key management personnel in accordance with the requirements of the Corporations Act is a complex area for preparers, auditors and shareholders and the Panel doubts that the same level of reporting would be appropriate for most registered entities.

Several stakeholders also indicated that the sector would be assisted if the ACNC published data or research on the level of remuneration paid to responsible persons and senior executives by registered entities categorised by size and subtype.

The ACNC has published information for registered entities about paying responsible persons for their duties.¹⁴⁹ This guidance stresses the need for a clear policy that outlines how remuneration is determined, the processes for its approval, disclosure to relevant stakeholders and providing opportunities for stakeholders to raise any concerns about payments. The guidance goes on to note:

Transparency is an important principle here. Board remuneration may be a significant part of charity operations, and charities should be open about it and the policies that support it.

Making the details of the payments or the policies available to the public is good practice and can demonstrate a commitment to transparency. A charity that pays its board members should be prepared to publicly justify the payments and explain why they are appropriate.

Charities that prepare financial statements may also need to disclose key management personnel (such as board member) remuneration in accordance with the Australian Accounting Standards Board Related Party Disclosures standard (AASB 124).

The Panel endorses these comments in relation to large registered entities with a turnover of \$5 million or more, and considers that the ACNC should introduce additional questions in the AIS in relation to the remuneration (if any) paid to responsible persons and senior executives. Remuneration should be reported on an aggregated basis in bands which, to the extent reasonably practicable, preclude the specific remuneration paid to an individual (either a responsible person or senior executive) being able to be identified.

The ACNC, in conjunction with the AASB, should also provide guidance as to the appropriate disclosure in annual financial reports of any remuneration paid to responsible persons and senior executives by medium and large registered entities in compliance with AASB 124.

¹⁴⁷ The persons responsible for the governance of registered entities are described in the ACNC Act as 'responsible entities'. However, in its educational and explanatory material the ACNC describes the people responsible for the governance of charities as 'responsible persons'. This Report generally uses the terminology of the ACNC in its educational and explanatory material (that is, responsible persons).

¹⁴⁸ Section 300A(1)(c) of the Corporations Act requires the disclosure of remuneration information for key management personnel (as defined in accounting standards). AASB 124 defines key management personnel as 'those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity'. This section only applies to disclosing entities (as defined in the Corporations Act) and section 111L of the Corporations Act provides that Part 2M.3 of the Act (including section 300A) does not apply to most corporations that are registered under the ACNC Act.

¹⁴⁹ ACNC website, viewed 7 May 2018, <http://www.acnc.gov.au/ACNC/Edu/Remunerating.aspx>.

Conclusions

The current revenue thresholds for determining registered entity size, and the minimum reporting requirements for registered entities are too low and have created an increase in red tape for some registered entities. The burden imposed on some registered entities is unnecessary and onerous, particularly where a registered entity is heavily reliant on volunteers.

The revenue thresholds are proposed to be increased to less than \$1 million for a small registered entity, from \$1 million to less than \$5 million for a medium registered entity and \$5 million or more for a large registered entity and determined on a rolling three-year basis (i.e. average revenue for the current financial year and the preceding two financial years).

The new thresholds should be prescribed in the ACNC Regulations and section 205-25 of the ACNC Act should be amended to remove references to the current threshold amounts.

Some changes are required to the minimum reporting requirements. The requirements would be:

- small registered entities continue to be required to provide an AIS to the ACNC (including basic financial information) and have the option to provide either a simplified balance sheet in its AIS (if it uses accrual accounting and prepares a balance sheet that complies with accounting standards) or a statement of resources;
- medium registered entities continue to be required to provide an AIS to the ACNC and reviewed or audited annual financial statements; and
- large registered entities continue to be required to provide an AIS to the ACNC and audited annual financial statements.

In addition, greater transparency would be achieved if small registered entities which prepare reviewed or audited annual financial statements in accordance with accounting standards for other reasons were required to lodge them with the ACNC. Similarly, medium registered entities which prepare audited annual financial statements in accordance with accounting standards for other reasons should be required to lodge them with the ACNC. This represents changes from the current position where such lodgements are voluntary.

Greater disclosure of related party transactions and remuneration practices is required to improve public trust and confidence in the sector.

All registered entities should disclose related party transactions in their AIS and all medium and large registered entities should comply with AASB 124 – Related Party Disclosures in their annual financial reports irrespective of whether the registered entity is otherwise required to comply with AASB 124.

However, disclosure of remuneration practices should only be required of large registered entities and the ACNC should introduce additional questions in the AIS in relation to the remuneration (if any) paid to responsible persons and senior executives. In addition:

- the ACNC, in conjunction with the AASB, should provide guidance as to the appropriate disclosure in annual financial reports of any remuneration paid to responsible persons and senior executives by medium and large registered entities in compliance with AASB 124; and
- the ACNC should publish data or research on the level of remuneration paid to responsible persons and senior executives by registered entities categorised by size and subtype.

Finally, given that several changes in accounting standards were foreshadowed in consultations, the ACNC, AASB and AUASB, in consultation with the sector and other stakeholders, should consider further changes to the financial reporting framework for registered entities having regard to the three principles of regulatory necessity, reflecting risk and proportionate regulation.

In addition to the recommendations below, some additional changes to the ACNC Act mentioned in this chapter are set out in Appendix B.

Recommendation 12

Registered entities be required to report based on size, determined on rolling three-year revenue, with thresholds of less than \$1 million for a small entity, from \$1 million to less than \$5 million for a medium entity and \$5 million or more for a large entity.

Recommendation 13

Minimum reporting requirements for small registered entities be amended to allow in an Annual Information Statement (AIS) an option to provide a simplified balance sheet or a statement of resources.

Recommendation 14

Registered entities be required to disclose related party transactions.

Recommendation 15

Large registered entities be required to disclose the remuneration paid to responsible persons and senior executives on an aggregated basis.

7. Basic Religious Charities

Introduction

Religious entities registered under the ACNC Act are potentially in a different position from other registered entities. Section 116 of the Australian Constitution provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. (our emphasis)

While the scope of section 116 can be debated, it imposes some limits on the power of the Commonwealth to make laws in relation to religious registered entities which do not apply to the making of laws in relation to other registered entities.

Australia, as a signatory to the International Covenant on Civil and Political Rights (ICCPR) and Universal Declaration of Human Rights (UDHR) is also committed to protecting freedoms of conscience, religion, association and other fundamental rights and freedoms which are essential to civil society.

Basic religious charities

The ACNC Act recognises the different position of religious registered entities in a limited way. The term ‘basic religious charity’ is used in the ACNC Act ‘to identify certain registered entities that have different obligations and requirements’ under the ACNC Act.¹⁵⁰

A BRC is defined in section 205-35 of the ACNC Act and must be an entity registered with a purpose of ‘advancing religion’. However, not all registered entities with the ‘advancing religion’ subtype are BRCs. In addition, a BRC must not:

- be entitled to be registered with another subtype (for example, advancing education);
- be incorporated or registered under specified legislation,¹⁵¹ although registered entities incorporated under other legislation may be BRCs;¹⁵²
- be endorsed as a deductible gift recipient (subject to some exemptions);
- be part of a reporting group; and
- be in receipt of more than \$100,000 in grants from Commonwealth government agencies in the reporting period or in the previous two reporting periods.

Based on the Australian Charities Report 2016, of the 52,166 registered entities, 14,890 (32 percent) had a purpose of ‘advancing religion’ and of those registered entities, 8,347 (16 percent) were self-assessed as BRCs.¹⁵³ In addition, a significant number of faith-based registered entities have not registered with a purpose of ‘advancing religion’ notwithstanding that their governing rules contain very clear statements of religious purpose.¹⁵⁴

¹⁵⁰ Revised Explanatory Memorandum to the ACNC Bills, paragraph 13.77.

¹⁵¹ The Corporations Act, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, the *Companies Act 1985* of Norfolk Island or the Associations Incorporation Acts of the States and Territories.

¹⁵² For example, the *Anglican Church of Australia (Bodies Corporate) Act 1938* (NSW), the *Religious Educational and Charitable Institutions Act 1861* (Queensland) and similar legislation in other States and Territories.

¹⁵³ Powell, Cortis, Ramia and Marjolin, *Australian Charities Report 2016*, Centre for Social Impact and Social Policy Research Centre, University of New South Wales, page 86. Based on the information provided by the ACNC, see table 2 in chapter 6.

¹⁵⁴ The submission from the Anglican Church Diocese of Sydney, 26 February 2018 contains an analysis of these faith-based charities and estimates that ‘the combination of “religious purpose” and faith-based charities accounts for just over half (51.1 percent) of all registered charities’ (page 8).

BRCs are entitled to protections not available to other registered entities. A BRC does not have to:

- answer financial information questions in its AIS;¹⁵⁵
- submit annual financial reports to the ACNC (regardless of its size);¹⁵⁶ or
- comply with the governance standards.¹⁵⁷

Further, the Commissioner does not have the power to remove or replace a responsible person¹⁵⁸ of a BRC.¹⁵⁹

It seems the concept of a BRC is based, at least in part, on the concept of religious freedom.

The BRC was intended as a classification for faith-based congregations to be granted a lower reporting burden and be exempt from certain mandatory governance arrangements for charities, because it was regarded as inappropriate for the ACNC to interfere in the governance of small religious bodies which were not incorporated and received little direct funds from government.¹⁶⁰

The concept of a BRC may also reflect the rights and freedoms in the ICCPR and the UDHR.

What we have heard

A need for change

The Report of the Royal Commission into Institutional Responses to Child Sexual Abuse made a number of recommendations relating to religious institutions.¹⁶¹ Among other things, the Royal Commission highlighted the need for improved transparency and accountability of religious institutions in relation to governance standards, codes of conduct, transparency, structures, amendments to canon law as well as professional development, supervision and performance appraisal.

The Commonwealth and the State and Territory Governments are considering responses to the report, including a National Redress Scheme. Religious institutions are also considering their responses to the report and the National Redress Scheme.

These matters need to be taken into account in reviewing the provisions of the ACNC Act, particularly those relating to reporting by, and the governance of, religious registered entities.

Religious and other freedoms

In submissions and consultations, concerns were raised about the capacity of the Commissioner to interfere with fundamental freedoms, particularly religious freedom.

¹⁵⁵ ACNC website, viewed 7 May 2018, http://www.acnc.gov.au/ACNC/Manage/ManageType/Basic_rel_ent/ACNC/Edu/Basic_rel_char.aspx?hkey=c089c700-52a6-47cf-a3a9-3111a97014b2

¹⁵⁶ Section 60-60 of the ACNC Act.

¹⁵⁷ Section 45-10(5) of the ACNC Act.

¹⁵⁸ The persons responsible for the governance of registered entities are described in the ACNC Act as 'responsible entities'. However, in its educational and explanatory material the ACNC describes the people responsible for the governance of charities as 'responsible persons'. This Report generally uses the terminology of the ACNC in its educational and explanatory material (that is, responsible persons).

¹⁵⁹ Section 100-5(3) of the ACNC Act.

¹⁶⁰ Australian Centre for Philanthropy and Non-profit Studies, Queensland University of Technology Business School, *ACPNS Current Issues Information Sheet 2015/2 (April 2015)*, page 2.

¹⁶¹ Report of the Royal Commission into Institutional Responses to Child Sexual Abuse: volume 16 religious institutions, pages 50 to 61.

For example, the submission from the Uniting Church in Australia Assembly noted:

We believe that the increase of the Commission's powers without specifying the circumstances in which they can be used, or providing safeguards against their abuse, has the potential to impact adversely on the ability of the Church to advocate on behalf of people who are marginalised and disadvantaged in line with our Gospel calling. We also believe that this may have an adverse impact on freedom of religion.¹⁶²

The Panel also noted that the Commonwealth Government has recently received the report of the Religious Freedoms Review from the Expert Panel appointed to examine whether the law adequately protects the human right to freedom of religion.¹⁶³

Basic religious charities

The question of whether the continuation of the concept of a BRC could be justified was one of the major themes in submissions and in consultations undertaken by the Panel. The submissions received by the Panel variously argued that the provisions relating to BRCs:

- have not been controversial and should be retained;
- are of continuing importance to avoid unreasonable regulatory burden on small unincorporated religious communities;
- should be abolished, noting that community values have changed in the past five years and more transparency is required;
- should be extended to all incorporated entities which are only registered with the 'advancing religion' subtype;
- should be extended to all mutual-like registered entities where the income generated by the entity is primarily derived from members; and
- should be applied in whole or part to all small registered entities, or a new category of micro entities with revenue of less than \$50,000 per annum.

Professor Ann O'Connell noted in her submission that the provisions in the ACNC Act relating to BRCs were only added after the tabling of the first draft of the ACNC Bill in 2012. The Australian Catholic Bishops Conference advised the Panel that their understanding was that the ACNC Bill was redrafted to avoid constitutional difficulties exposed in the first draft of the ACNC Bill. The exercise of any powers of the ACNC to replace and appoint responsible persons in religious registered entities or to direct religious registered entities to alter governance rules and structures could have been subject to constitutional challenge.

The Advisory Board noted that 'the operation of section 205-35 has not been controversial, and the review panel should affirm the continued operation of the provision.' In contrast, the Prime Minister's Community Business Partnership considered that a level playing field should operate in respect of all registered entities, without regard to the religion, ensuring a fair and equitable regulatory treatment of registered entities across the sector.¹⁶⁴

Some religious denominations submitted that the BRC category strikes the correct balance between red tape and religious freedom of action by providing transparency about the activities, personnel, size, governance and responsible persons of BRCs, while keeping the time and resources involved in financial reporting and regulatory compliance to a minimum for unincorporated church entities. The Panel understands that most BRCs are unincorporated parishes and congregations served by volunteers and raise donations from members (rather than the public). Some submissions questioned the benefit to the public of requiring financial reporting by those parishes and congregations.

¹⁶² Submission, Uniting Church in Australia Assembly, 28 February 2018, pages 9 and 10.

¹⁶³ Department of the Prime Minister and Cabinet website, viewed 7 May 2018, <https://www.pmc.gov.au/domestic-policy/religious-freedom-review>.

¹⁶⁴ Submission, Prime Minister's Community Business Partnership, received 8 March 2018.

For example, the submission from the Uniting Church in Australia Assembly stated:

*Basic Religious Charities provide the opportunity for people of faith and goodwill to operate together in a simple but effectively governed way that finds the balance between red tape and religious freedom of action. As a result, the Uniting Church in Australia and its many members particularly value the support of the Commission for Basic Religious Charities and we are taking the opportunity to restate our support for these and for the approach the Commission has taken to date. Any changes to these bodies could have dire impacts on the life of the Church in Australia and the freedom of many religious communities to give expression to the call of the Gospel and would not be supported by the Uniting Church.*¹⁶⁵

The concerns expressed in the 20 or more submissions which argued for the abolition of the BRC provisions are reflected in the submission from Professor Ann O’Connell:

*The exemptions under the principal ACNC Act for a ‘basic religious charity’ (BRC) should be removed. These exemptions were included in the Act as a result of lobbying by the established religious entities and they will, no doubt resist the removal of the exemptions. The exemptions serve no logical purpose and are limited to those religions that are unincorporated. Newer religions that adopt a legal form for operation are discriminated against. In relation to reporting, if the BRC has revenue less than \$250,000 (or some other appropriate minimum) it will only have to undertake minimal reporting. BRCs should, like all other charities, also be subject to the governance standards. As a result of the Royal Commission into Institutional Responses to Child Sexual Abuse it is no longer appropriate to assume that the governance of religious entities will always be of a high standard.*¹⁶⁶

Several submissions questioned why BRCs should be exempt from financial reporting since an exemption from income tax based on registration under the ACNC Act is a public benefit (through tax forgone) that warrants public accountability.¹⁶⁷ In addition to tax exemption, BRCs are entitled to fringe benefits tax concessions, franking credit refunds and GST concessions. Tax exempt entities are also not required to submit a tax return.

Other submissions noted that many BRCs control significant assets and their exclusion from the reporting framework is at odds with appropriate accountability and transparency for all registered entities and diminishes the value of aggregate data about the sector provided by the ACNC through the Australian Charities Report.

Some submissions noted that religious registered entities that take a particular legal form (for example, BRCs which are generally unincorporated associations) are favourably treated, while others that take a different form (for example, BRCs incorporated under specific statute) are not entitled to the same exemptions.

Our consideration of the issues

Religious and other freedoms

As discussed in chapter 2, the ACNC Act should be amended to require the Commissioner in performing his or her functions and exercising his or her powers, to respect the independence of the sector in carrying out duties under the ACNC Act. This would include respecting the fundamental rights and freedoms protected by section 116 of the Australian Constitution or set out in the ICCPR, the UDHR and other international treaties and covenants to which Australia is a party (including the freedoms of religion, peaceful assembly and association).

This change to the ACNC Act would diminish some of the concerns raised in submissions and consultations about the Commissioner’s capacity to interfere with fundamental rights and freedoms but it raises concerns about the governance and transparency of religious registered entities.

¹⁶⁵ Submission, Uniting Church in Australia Assembly, 28 February 2018, page 10.

¹⁶⁶ Submission, Professor Ann O’Connell, 30 January 2018. See also the detailed discussion in Professor Ann O’Connell’s additional submission (dated 1 March 2018) about, among other matters, the chronology of events resulting in the inclusion of the BRC provisions, rationales for the provisions and some data concerning reliance on the provisions.

¹⁶⁷ Submission, Justice Connect, 28 February 2018.

Basic religious charities

The key elements of the BRC provisions are:

- exemption from financial reporting requirements;
- exemption from the governance standards; and
- exemption from regulatory powers to remove and replace responsible persons.

These elements have been considered by the Panel in the broader context of the Review.

Financial reporting requirements

As discussed in chapter 6, the Panel has reviewed entity sizes and thresholds adopted by the ACNC for financial reporting and other regulatory purposes.

The Panel considers the current thresholds could be changed to more accurately reflect the composition of the sector and more appropriately reflect the risks facing the sector, as well as reducing red tape and the regulatory compliance burden on small registered entities. The Panel has proposed that the current thresholds used by the ACNC to determine entity size, and the related financial reporting requirements, be increased to less than \$1 million for a small entity, from \$1 million to less than \$5 million for a medium entity and \$5 million or more for a large entity.

As noted in chapter 6, the Panel considered the use of different criteria for the thresholds and concludes that revenue should be retained as the basis of the distinction between small, medium and large registered entities. Revenue would continue to be calculated on the same basis as present, except that a rolling three-year average of annual revenue should be used to determine size for all registered entities.

The Panel also proposes that small registered entities have the option to provide either a simplified balance sheet in its AIS (if it uses accrual accounting and prepares a balance sheet that complies with accounting standards) or a statement of resources. The proposed statement of resources would only require a description of the assets used by the small registered entity to be provided in an AIS. Valuations would only be required to be attributed to those assets where they were readily and easily ascertained.

Both (a) the retention of revenue as the basis for determining the thresholds, and (b) the use of a statement of resources will obviate the need for religious registered entities to determine the basis, and incur the cost, of valuation for assets which have not historically been required to be valued in accordance with accounting standards (for example, some heritage listed buildings held in trust for religious purposes).

If BRCs were no longer exempt from financial reporting requirements (see below), the recommended thresholds would result in many parishes and congregations only being required to provide the financial information in an AIS (with the option of a statement of resources rather than balance sheet financial information).¹⁶⁸ Financial reports would only be required for parishes and congregations with revenue of \$1 million or more.¹⁶⁹

Such a change should not be onerous and would improve transparency.

Any burden would be further reduced if the ACNC Act was amended:

- to give the Commissioner a discretion to permit financial statements and other financial information reported by an entity registered with the advancing religion subtype (and not entitled to be registered with another subtype) from being made public if the entity's

¹⁶⁸ The Panel was advised by representatives of religious denominations that a threshold of annual revenue of less than \$1 million for small registered entities would result in a very high percentage of parishes and congregations being categorised as small registered entities.

¹⁶⁹ It is likely that BRCs with revenue of \$1 million or more will already be preparing financial reports for other purposes and, in some cases, voluntarily publish their financial reports.

revenue is primarily received from members (for example, parish or congregation members);

- to allow medium or large entities registered with the ‘advancing religion’ subtype (and not entitled to be registered with another subtype) not to include consolidated financial information in its annual financial statements where its controlled entities are separately registered under the ACNC Act; and
- to give the Commissioner the power to exempt a medium or large entity registered with the advancing religion subtype (and not entitled to be registered with another subtype), or a class of such entities, from having to prepare annual financial statements in compliance with accounting standards if the entity is not otherwise obliged to do so, provided the entity lodges, and discloses the basis on which it prepares, annual statements or an annual financial report (for example, in accordance with denominational governance and reporting requirements).

ACNC governance standards

As discussed in chapter 5, the Panel has reviewed the ACNC governance standards.

To address inconsistencies in the governance requirements applying to different types of legal entities and other concerns raised in submissions and consultations, the Panel proposes that registered entities be presumed to comply with ACNC governance standards if they comply with comparable governance requirements.

In this regard, the Panel recommends in chapter 5 that a registered entity be presumed to comply with the governance standards if it declares in its AIS that it already complies with other comparable governance requirements.

Many BRCs may already be obliged to comply with a comparable denominational or other religious governance requirement¹⁷⁰ and therefore there would be no further requirement to comply with the ACNC governance standards.

Regulatory powers to remove and replace responsible persons

As discussed in chapter 3, the Panel has also reviewed the powers of the Commissioner to remove or replace a responsible person of a registered entity.

The Panel recommends in chapter 3 that the ACNC Act be amended to repeal the power to replace a responsible person of a FRE because:

- it exceeds the powers of ASIC in relation to corporate boards, and the powers of most other Commonwealth, State and Territory regulators in relation to the governing boards or persons of regulated entities; and
- it is not subject to judicial oversight or control prior to exercise.

If this change is adopted, then the power of the Commissioner to replace the spiritual leader of a religious registered entity will be removed and the power of the Commissioner to otherwise interfere in the governance of a religious registered entity would be limited – in the case of FREs, to the suspension of persons and the giving of directions.¹⁷¹

These changes address many of the concerns raised by religious registered entities and would also minimise the risk that the current powers of the Commissioner could be found to be prohibiting the free exercise of religion in breach of section 116 of the Australian Constitution.

¹⁷⁰ In this context it is noted that religious registered entities which are not BRCs (for example, incorporated congregations) have seemingly been able to meet their compliance obligations under the governance standards without facing an onerous or unnecessary burden.

¹⁷¹ Subject to any necessary amendments to the ACNC Act following the repeal of governance standard 3 (see chapter 5) and any other changes in law to allow the Commissioner to take action to protect charitable and other assets.

Conclusions

The Panel's understanding based on submissions and consultations, is that the reporting exemption for BRCs set out in section 60-60 of the ACNC Act is a lesser concern to established religious denominations than the other elements of the BRC provisions. It is probable that if the changes recommended by the Panel to the financial reporting requirements were adopted, this would not result in the imposition of onerous reporting requirements if there was no exemption for BRCs, and would improve transparency.

The removal of the exemption from the ACNC governance standards is a matter of significant concern to established religious denominations, but if the changes recommended by the Panel to the functions and powers of the Commissioner and the governance standards were adopted, this concern would be diminished and further consideration of the necessity for the governance exemption for BRCs should be undertaken.

If the powers of the Commissioner to replace responsible persons were repealed, then the exemption for BRCs partially falls away.

If all the relevant changes recommended by the Panel were not adopted (or if only the relevant changes relating to the financial reporting requirements were to be adopted), then the Panel shares the view of the Advisory Board that the BRC provisions should be maintained at this time.

Recommendation 16

If recommendations 12 and 13 are adopted, the necessity for the exemption from financial reporting for basic religious charities be reviewed, and if recommendations 5 and 10 are also adopted, all exemptions for basic religious charities be reviewed.

8. Secrecy

Introduction

In recent years, there has been debate regarding the extent to which information should be made public regarding private contributions to the charitable purposes.¹⁷²

This leads to a tension between the right to privacy of donors to a registered entity and the community's interest in the disclosure of information about the activities of a registered entity (for example, to ensure assets are being applied for the purposes of the entity). Disclosure and accountability is of greater importance as the percentage of an entity's funding provided by government increases, and correspondingly is of lesser importance when little or no government funding is provided to the entity.

This tension between the right to privacy and disclosure relates to how public trust and confidence in the sector is maintained, protected and enhanced: the first object of the ACNC Act. The right to privacy of personal and confidential information is balanced against the disclosure of information to the public to achieve the objects of the ACNC Act.

Some examples of the right to privacy include:

- restrictions on the sharing of information by the ACNC with other Commonwealth Government agencies;
- prohibitions on the ACNC making any public comment on investigations;
- the protection of the privacy around private ancillary funds; and
- the right of the Commissioner to withhold information in certain circumstances.

The principle of disclosure is seen in all dimensions of the Register and provisions relating to public accountability and transparency. This distinction between private action and public benefit provides a framework for deciding what information should and should not be publicly disclosed.

The public has an interest in ensuring that assets are applied by registered entities for community benefit or social purposes. However, the case for disclosure of private action is harder to establish, particularly if disclosure may have the effect of discouraging philanthropy and volunteering or otherwise inhibiting the provision of charitable goods and services.

Legislation

The balance between the right to privacy and disclosure is reflected in Division 150 of the ACNC Act. The provisions of Division 150 limit the disclosure of 'protected ACNC information' and are referred to as the 'secrecy provisions'.

'Protected ACNC information' is defined in section 150-15 of the ACNC Act as 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.*¹⁷³

Under section 150-25 of the ACNC Act, it is an offence for the Commissioner or a member of his or her staff to disclose protected ACNC information other than to the entity to whom the information relates

¹⁷² See *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (Strategy Unit, Cabinet Office, UK Government, 2002) and *Charities and Not-for-Profits: A Modern Legal Framework – The Government's response to 'Private Action, Public Benefit'* (UK Home Office, 2003).

¹⁷³ An 'entity' is defined in section 205-5 of the ACNC Act as any individual, body corporate, body politic, other unincorporated association or body of persons, or a trust.

or their agent (or, where the entity is a registered entity, one of the registered entity's responsible persons).¹⁷⁴

The secrecy provisions in the ACNC Act preclude publication of the Commissioner's decisions even if those decisions have broader public interest or precedential value.

Exemptions to the prohibition on disclosing protected ACNC information exist, which includes the disclosure of protected ACNC information:

- by an ACNC officer in the performance of his or her duties under the ACNC Act;
- for the purposes of including the information on the Register and, if it is personal information, that the disclosure is necessary to achieve the objects of the Act;
- to an Australian government agency¹⁷⁵ where certain conditions are met;
- for a purpose with the consent of the entity to which the information relates to disclose or use the information for that purpose; and
- that has already been lawfully available to the public and is for the purposes of the Act.¹⁷⁶

What we have heard

The submission from the ACNC indicated that some applications for registration have raised novel questions, the determination of which may have broader public interest or precedential value.¹⁷⁷

The Panel notes that the ACNC has provided, for example, case studies in its compliance reports, which are helpful to the sector.

The ACNC submission also indicated that the secrecy provisions in the ACNC Act may impede public confidence with respect to the ACNC's compliance activities in two important ways:

- revocation - the Commissioner has the power to revoke an entity's registration under the ACNC Act. The ACNC publishes the fact that a revocation has occurred but due to the secrecy provisions, the reasons for revocation are not published. There is a concern that this erodes public confidence in the ACNC and the regulatory framework under the ACNC Act as regulatory decisions are made in secret. If decisions regarding revocation were published, it would provide other registered entities with guidance as to poor behaviour and encourage compliance.
- enforcement powers - section 40-5(1)(f) of the ACNC Act requires the ACNC to enter the details of each exercise of the Commissioner's enforcement powers on the Register under Part 4-2 of the ACNC Act. The enforcement powers under Part 4-2 may only be exercised against a FRE and the ACNC has other compliance approaches it may take with respect to non-FREs. However, the secrecy provisions in the ACNC Act prevent these other compliance approaches from being publicly known.¹⁷⁸

Where there are compliance problems in a non-FRE, there may often be public, media and government interest in that non-compliance. A perceived lack of action by the ACNC may undermine confidence in the ACNC and the regulatory framework under the ACNC Act, even where compliance action is taken. In turn, this may have an impact on the trust and confidence of the public in the sector or in non-FREs.

¹⁷⁴ The penalties for non-compliance with section 150-25 are considerable: up to a maximum of two years imprisonment or 120 penalty units or both. See section 150-55 of the ACNC Act.

¹⁷⁵ The term 'Australian government agency' is defined in section 300-5 of the ACNC Act to mean (a) the Commonwealth, a State or a Territory, or (b) an authority of the Commonwealth or of a State or a Territory.

¹⁷⁶ Subdivision 150-C of the ACNC Act.

¹⁷⁷ Submission, ACNC, received 19 January 2018.

¹⁷⁸ Submission, ACNC, received 19 January 2018.

The submission from the ACNC indicated that it may not be appropriate to make public information regarding every compliance or enforcement action by the Commissioner and that a variety of factors should be considered. These include the benefit to the public of a statement, the potential prejudice to any entity being investigated, and whether a public statement might jeopardise an ongoing investigation and the risk of defamation.¹⁷⁹

The ACNC noted that other Commonwealth regulators such as ASIC, the ACCC and the APRA have greater discretion in their ability to make public statements, and to use information for the purposes of such a statement where appropriate.¹⁸⁰

The ACNC indicated that it considers the requirement that the disclosure of information already in the public domain must be made for the purposes of the ACNC Act is unnecessary on the basis that where information is already in the public domain, it should be available to everyone. Once information is public it loses its confidential status. The ACNC further noted that equivalent legislative provisions in relation to other regulators provide that where information is public, it can be disclosed.

The submission from the ACNC also noted that the exemption for disclosure to an Australian government agency requires four conditions to be satisfied and it is not clear that disclosure would be permitted in bulk to facilitate efficiencies (data matching, analysis and research for criminal intelligence and law enforcement purposes) or for the purposes of the third object of the ACNC Act (for example, to implement arrangements with other regulators to reduce regulatory duplication).¹⁸¹

There was support for the ACNC's view that the secrecy provisions in the ACNC Act should be amended with a view to improving the public trust and confidence in the sector, including in submissions from Beyond PMSA, the ACT Government and the Council of Social Service Network.

The LCA submitted that all decisions of the Commissioner, which include the Commissioner's right to publish or withhold information should be subject to judicial review of all the issues (a 'de novo' review).¹⁸² The submissions from the LCA and the Law Institute of Victoria also both drew the Panel's attention to abuse of the public disclosure information of volunteers.¹⁸³

Philanthropy Australia submitted that the current drafting of the exemptions applicable to private ancillary funds is inadequate and recommended the following changes to give better effect to the legislative intent:

Philanthropy Australia's preferred solution would be to amend the Clause to provide that where a PAF has living donors, all information from the PAF can be withheld from being published on the ACNC Register (without the need to meet any additional conditions), but that de-identified information will be made available by the ACNC through the 'data.gov.au' portal. No names (including that of the PAF and donors/responsible entities), addresses or other identifying information would be included, but [that specified data items could be made available].¹⁸⁴

Our consideration of the issues

The sharing of information within government

Neither in submissions nor consultations has any information been put to the Panel that allowing Commonwealth agencies to share information prejudices the right to privacy in such a way as to warrant continuation of the present arrangements contained in the secrecy provisions in the ACNC Act.

¹⁷⁹ Submission, ACNC, received 19 January 2018.

¹⁸⁰ Submission, ACNC, received 19 January 2018.

¹⁸¹ Submission, ACNC, received 19 January 2018.

¹⁸² Submission, LCA, 28 February 2018.

¹⁸³ Submission, LCA, 28 February 2018; Submission, Law Institute of Victoria, 16 March 2018.

¹⁸⁴ Submission, Philanthropy Australia, 28 February 2018, pages 10 and 11.

Quite to the contrary, the information provided to the Panel was to the effect that once information is provided to the ACNC, it is presumed that the ACNC shares that information with other Commonwealth agencies. Further, the sharing of information between Commonwealth agencies is likely to assist in the rapid detection of misconduct which, in turn, is likely to support the carrying into effect of the objects of the ACNC Act.

The Panel notes that the Commonwealth Government announced the establishment of a National Data Commissioner in the 2018-19 Budget to (amongst other things) oversee the implementation of a simpler and more efficient government data use framework.

The Panel suggest further consideration be given to relaxing or removing the restrictions on the ACNC sharing information with other Commonwealth agencies.

Disclosure in relation to investigations of registered entities

Unless the affected registered entity provides consent under section 150-45 of the ACNC Act, the current position that the ACNC can only respond to queries (whether from the media, registered entity or the broader public) with a 'no comment' is unhelpful. It is understood to be an evasive response which ultimately erodes public confidence in the ACNC. The public is entitled to be confident that the ACNC is doing its job and is being an effective regulator.

It is important to distinguish between the actions of one individual at a registered entity and actions of a registered entity which are approved, or acquiesced to, by the responsible persons¹⁸⁵ as a whole (particularly when this has occurred repeatedly or systematically). A level of discretion is needed so as not to harm an entity such that potential donors are discouraged from making donations. There is also a right to the presumption of innocence until proven guilty. Given that a registered entity's reputation is critical to its ability to raise funds and carry on its purpose, care needs to be taken in respect of any comments that the ACNC can, or should, make in respect of potential or actual investigations.

However, there are some circumstances where there is a need for a response, such as when publicly disseminated comments are incorrect and likely to mislead the public, or unreasonably harm a registered entity, or where the public may be at risk of donating to an inappropriate entity. In these circumstances, the ACNC needs to have more flexibility to comment at the right time, in the right manner. This ultimately goes to its objective of maintaining public trust and confidence in the sector.

If there is a complaint which is upheld and the Commissioner has taken action, the Panel considers the ability to disclose that action should depend on the severity of the action taken by the Commissioner. It is likely that disclosure of a disciplinary action should only be required in the case of the matter being in the public interest or necessary to maintain public trust and confidence in the sector. Matters of minor significance and procedural or technical breaches will be adequately addressed through confidential actions and current processes should remain. Accordingly, where there is a low risk of repeated breaches, the Commissioner should not be disclosing the outcome of its decision.

In some circumstances, when an investigation is completed, it may be of broader educational value to the sector for information regarding the investigation to be made public. The identity of the relevant registered entity could be protected but the relevant circumstances, decision and reasons for the decision (on a non-identifiable basis) would, in many cases, serve to highlight the Commissioner's views to the sector. An example exists in relation to disclosure of private binding tax rulings on a de-identified basis, in the form of an ATO Interpretative Decision (ATOID), which is intended to provide additional guidance to taxpayers on the way the Commissioner of Taxation makes decisions.

¹⁸⁵ The persons responsible for the governance of registered entities are described in the ACNC Act as 'responsible entities'. However, in its educational and explanatory material the ACNC describes the people responsible for the governance of charities as 'responsible persons'. This Report generally uses the terminology of the ACNC in its educational and explanatory material (that is, responsible persons).

The protection of privacy for private ancillary funds

There is a long tradition in Australia of recognising the privacy of charitable giving. This is recognised in Regulation 40-10 of the ACNC Regulations which specifically allows private ancillary funds to ask the Commissioner to withhold or remove information from the Register.

The broader question is why other registered entities should not also be entitled to similar privacy. The most obvious case would be general charitable trusts which are similar to private ancillary funds. However, the publication of information may discourage philanthropy and volunteering, or otherwise inhibit the provision of charitable goods or services.

Given the lack of submissions in relation to these matters the Panel suggests:

- the adoption of the changes proposed by Philanthropy Australia to withhold from the Register but provide de-identified information through the Charity Portal; and
- further consultation with stakeholders as to the application of principles of privacy to the ACNC legislation.

The right of the Commissioner to withhold information in certain circumstances

The ACNC Act does not set out a requirement on the part of the Commissioner that there be a balancing of the right to privacy against the public benefit of transparency by publication on the Register.

Section 40-10(1) of the ACNC Act gives the relevant Minister power to prescribe regulations and sets out circumstances in which the Commissioner may withhold or remove information. Something akin to a balancing requirement is set out in section 40-10(3) which requires the Commissioner to consider 'the public interest' in making a determination.

The Commissioner issued a Policy Statement setting out six principles applied in determining whether to withhold information. This can be summarised as:

- publication is generally in the public interest;
- justification must be provided for withholding or removing information;
- publication should be restricted only to the extent necessary;
- there should be consistency in approach even though decisions are made on a case-by-case basis;
- if the ACNC makes a mistake it will endeavour to rectify the error; and
- an ACNC internal review may be sought.¹⁸⁶

A decision by the Commissioner under section 40-10 is not subject to Part 7-2 (Review and Appeals) provisions. The LCA in its submission pointed out that all decisions of the Commissioner should be subject to judicial review of all issues (discussed further in chapter 3).

Publicising investigations to seek information from the community

The submission from the ACNC recommended amending the secrecy provisions to allow the ACNC to seek information from the community to support the ACNC's ongoing investigative efforts.¹⁸⁷ Past and present staff, volunteers, members, donors or beneficiaries of a registered entity often hold valuable information that can assist ACNC investigations. Providing a pathway for people to report directly to

¹⁸⁶ Commissioner's Policy Statement – Withholding or Removing Information from the ACNC Register (CPS2012/05), see ACNC website, viewed 7 May 2018, https://www.acnc.gov.au/ACNC/Pblctns/Pol/ACNC/Publications/Policy_PDFs/CommSt_Withhold.aspx

¹⁸⁷ Submission, ACNC, received 19 January 2018, page 40.

the ACNC's investigations team in particular cases has the potential to expand the facts and evidence relating to the matters under investigation.

In England and Wales, the CCEW may publicly seek information from the community to assist with its investigative activities. The Panel considers that the Commissioner should be empowered to seek information from the community to assist in a compliance investigation where the collection of the information is necessary to protect public trust and confidence in the sector.

Personal details of responsible persons

Currently, section 40-5(1)(c) of the ACNC Act requires the name and position of each responsible person of a registered entity to appear on the Register. However, the ACNC Act does not require other details of a responsible person to be provided, or expressly authorise the Commissioner to collect such information.

The submission from the ACNC recommended that the Commissioner be authorised to collect the personal details of responsible persons to enable the functions of the Commissioner to be exercised, and to collect information about the involvement of responsible persons in unlawful activity.¹⁸⁸

The ACNC recommended that the ACNC Act expressly authorise the Commissioner to collect:

...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.¹⁸⁹

The Panel agrees with the ACNC that it is necessary for the ACNC to be able to identify the responsible person of a registered entity for the purposes of ensuring compliance with the ACNC Act.

Conclusions

The secrecy provisions of the ACNC Act are overly restrictive and should be amended to allow the Commissioner to disclose information in a wider range of circumstances. The ACNC's inability to make any comment in respect of whether it is (or is not) undertaking an investigation regarding a complaint against a registered entity is harmful to the perception of the ACNC as an effective regulator.

Disclosure about regulatory activities (including investigations) should be permitted when it is necessary to protect public trust and confidence in the sector. Such disclosure would be in addition to disclosure in circumstances where the relevant registered entity has consented to the disclosure. In considering any potential disclosure, the Commissioner should consider, among other matters, the benefit to the public of disclosure, the potential prejudice to any registered entity, whether disclosure might jeopardise an ongoing investigation and the risk of defamation.

Disclosure could be made when necessary to seek information from the community to assist in a compliance investigation. In the case of completed investigations, decisions on an application for registration or other regulatory action, disclosure could be on a de-identified basis, in a similar manner to ATOIDs.

Finally, the ACNC should be able to collect the personal details of responsible persons involved in unlawful activity.

¹⁸⁸ Submission, ACNC, received 19 January 2018.

¹⁸⁹ Submission, ACNC, received 19 January 2018, page 33.

In addition to the recommendations below, some additional, but less substantive, changes to the ACNC Act mentioned in this chapter are set out in Appendix B.

Recommendation 17

The Commissioner be given a discretion to disclose information about regulatory activities (including investigations) when it is necessary to protect public trust and confidence in the sector.

Recommendation 18

The Commissioner be authorised to collect the personal details of responsible persons involved in unlawful activity.

9. Advocacy

Introduction

Advocacy is a key aspect of a vibrant civil society and plays an important role in the development of social policy. It allows Australians to voice their concerns and influence public policy and legislative development. The role of advocacy by charities is acknowledged as integral to community wellbeing.¹⁹⁰

While there is direction from the High Court of Australia in *Aid/Watch Incorporated v Commissioner of Taxation*¹⁹¹ (*Aid/Watch*), the *Charities Act 2013* (Cth) (*Charities Act*) and the ACNC guidance, there is still ambiguity in the public domain regarding the threshold between issues-based advocacy and political advocacy that may constitute a ‘disqualifying purpose’ under the *Charities Act*.

Case Law

In 2010, the High Court of Australia held in *Aid/Watch* that political advocacy by a charity in pursuit of its charitable purpose is lawful. The Commonwealth Parliament enshrined this principle in the *Charities Act*.

Aid/Watch Inc. was established in 1993 and became an income tax-exempt charity in 2000. It pursued its charitable purposes by monitoring Australian aid, conducting and publishing research into that aid and campaigning for changes to the ways in which aid was delivered by the Commonwealth Government.

In 2006, the ATO revoked *Aid/Watch*’s exemption because firstly, it did not distribute aid and therefore was not charitable; and secondly, it achieved its objects through campaigning which amounted to a ‘political purpose’.

Aid/Watch appealed the decision in the Administrative Appeals Tribunal (AAT) which found in favour of *Aid/Watch* and overturned the ATO’s revocation. Notably, the AAT found that *Aid/Watch* campaigned ‘very often against government’¹⁹² and engaged in activities that were ‘at the edges of appropriate conduct’.¹⁹³

The ATO appealed the AAT’s decision in the Federal Court of Australia, which handed down a judgment in favour of the ATO. *Aid/Watch* appealed the decision in the High Court of Australia which ultimately found in favour of *Aid/Watch*, holding that political advocacy by a charity in pursuit of its charitable purpose is lawful.

In its decision, the High Court noted that the generation by lawful means of public debate concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community.¹⁹⁴

¹⁹⁰ Productivity Commission Research Report, ‘*Contribution of the Not-For-Profit Sector*’, January 2010, page 37.

¹⁹¹ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 1 December 2010.

¹⁹² *Aid/Watch Incorporated and Federal Commissioner of Taxation* [2008] AATA 652; (2008) 71 ATR 386, para 4.

¹⁹³ *Aid/Watch Incorporated and Federal Commissioner of Taxation* [2008] AATA 652; (2008) 71 ATR 386, para 35.

¹⁹⁴ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 1 December 2010, paragraph 47.

Legislation

Subsection 12(1) of the Charities Act defines the charitable purposes in which charities may engage in advocacy and includes:

(l) the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:

(i) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or

(ii) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.

Importantly, section 11 of the Charities Act outlines the disqualifying purposes as:

(a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or

(b) the purpose of promoting or opposing a political party or a candidate for political office.

The Explanatory Memorandum to the Charities Bill 2013 (Charities Bill) clarifies that charities can still engage in activities such as policy debates, advocacy or lobbying activities to further their charitable purposes. They can also publish comparisons of party policies and how they align with their charitable purpose. In addition, charities may play a significant role in public affairs and are free to have the purpose of promoting or opposing laws, policies and practices, where this aids their existing charitable purpose.¹⁹⁵

The Explanatory Memorandum to the Charities Bill also provides that:

*A purpose of generating public debate with a view to influencing legislation, government activities or government policy in furtherance or protection of one or more existing charitable purposes, in a manner consistent with those purposes, may be charitable.*¹⁹⁶

In relation to disqualifying purposes, the Explanatory Memorandum to the Charities Bill notes:

The disqualifying purpose is concerned with direct partisan political engagement that supports or opposes a candidate or party for office or other partisan political engagement to the extent and in a way that this can be construed as a purpose.

*This does not prevent entities from distributing information, critiquing or comparing party policies in order to further the achievement of their charitable purpose.*¹⁹⁷

ACNC Guidance

In line with the decision by the High Court of Australia and the Charities Act, the ACNC guidance provides that a charity can promote or oppose a change to any matter of law, policy or practice, as long as this advocacy furthers or aids another charitable purpose.

The ACNC guidance provides:

Charitable purpose of advocacy

A charity can promote or oppose a change to any matter of law, policy or practice in furtherance or aid of another charitable purpose. The law, policy or practice being promoted or opposed can be in anywhere in Australia or overseas.

...

¹⁹⁵ Explanatory memorandum to the Charities Bill 2013, paragraph 3.28.

¹⁹⁶ Explanatory memorandum to the Charities Bill 2013, paragraphs 1.148 and 1.150.

¹⁹⁷ Explanatory memorandum to the Charities Bill 2013, paragraphs 1.107-1.108.

Disqualifying purposes – unlawful, contrary to public policy and political purposes

There are ‘disqualifying purposes’ which an organisation cannot have if it wants to be registered as a charity with the ACNC. These are the purposes of:

- *engaging in, or promoting, activities that are unlawful*
- *engaging in, or promoting, activities that are contrary to public policy, or*
- *promoting or opposing a political party or candidate for political office.*

...

Political purposes

An organisation may have a disqualifying purpose if its purpose is to promote a particular political party or a candidate for public office.

...

A charity can assess, compare or rank the policies of political parties or candidates in carrying out its charitable purpose. A charity may distribute information or advance public debate about the policies of political parties or candidates for political office, if it is furthering or aiding one of the charitable purposes set out in the Charities Act. This may be done by assessing, critiquing, comparing or ranking those policies.

A charity can:

- *spend money to publicly express views on the policies of different political parties relevant to its charitable purpose*
- *spend money to publicly express views on issues, including during an election*
- *spend money on broadcasting on ‘political matters’, or*
- *conduct research in order to critique the policies of different political parties.*

If a charity undertakes any activities in relation to an election, it must comply with all electoral laws, including disclosure requirements.¹⁹⁸

Proposed amendments to the Electoral Act

In December 2017, the Commonwealth Government introduced the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Electoral Funding and Disclosure Reform Bill) which seeks to amend the *Commonwealth Electoral Act 1918* (Cth).¹⁹⁹

Among other things, the Electoral Funding and Disclosure Reform Bill proposes to prohibit donations from foreign governments and state-owned enterprises being used to finance public debate; require political actors to verify the source of donations over \$250; and prohibit other regulated political actors from using donations from foreign sources to fund reportable political expenditure.²⁰⁰

The contentious issues for charities relate to the proposed definitions of ‘political expenditure’ and ‘political purpose’ included in the Electoral Funding and Disclosure Reform Bill. This Bill provides that a ‘political purpose’ includes ‘the public expression by any means of views on an issue that is, or is likely to be, before electors in an election’. Under this broad definition, it is likely that some charities would have a ‘political purpose’ and be subject to the proposed reporting requirements of the Electoral Funding and Disclosure Reform Bill.

¹⁹⁸ ACNC, ‘Political campaigning and advocacy by registered charities – what you need to know’, April 2016, http://www.acnc.gov.au/ACNC/Reg/Charities_elections_and_advocacy_.aspx, viewed 7 May 2018.

¹⁹⁹ Following introduction, the Bill was referred to the Joint Standing Committee on Electoral Matters for an inquiry. On 9 April 2018, the Committee issued its report to the Government which agreed, in principal, to the passage of the Bill subject to 15 recommendations. At the time of writing this Report, the Government had not yet responded to the Committee’s recommendations.

²⁰⁰ Explanatory Memorandum to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, page 5.

The ACNC has expressed concern that the amendments ‘may affect a charity’s ability to undertake some forms of advocacy and may decrease the advocacy work of charities that are unable to meet the proposed regulatory and compliance demands.’²⁰¹

What we have heard

In the Panel’s consultations, advocacy was a common concern for many stakeholders and was raised in over 25 submissions to the Panel. Charities view advocacy as a significant part of their role and linked to their charitable purpose.

There was little support to change the ACNC guidance on advocacy. Many stakeholders advised during consultations that the ACNC’s guidance is adequate and appropriate and provides helpful direction for registered entities and the wider sector.

The Councils of Social Service Network (COSS) stated in its submission that advocacy is an integral part of how charities fulfil their charitable purpose and an important part of the work that they perform in the communities in which they operate. COSS noted that charities are embedded in the community, understand the needs of their communities and their communities expect them to advocate on their behalf.²⁰²

The ACT Government stated in its submission that it:

*[S]upports charities and not-for-profit organisations being allowed to undertake advocacy activities and retain their charitable status. These activities are clearly inherent in the definitions of ‘charitable purpose’ within the Charities Act 2003, which variously refers to ‘advancing’, ‘promoting’ and ‘opposing’. A charity’s ability to undertake advocacy in line with its core purpose is fundamental to a robust, vibrant, independent and innovative sector. Charities and not-for-profit groups should not be penalised for advocating to change the policies and systems which have resulted in the community need for their services.*²⁰³

The critical nature of advocacy in the sector was noted by Jesuit Social Services:

*As a social change organisation working to build a just society where all people can live to their full potential, Jesuit Social Services seeks to do and to influence by working alongside marginalised members of the community and advocating for systemic change. At this time of accelerated change and sector reform we believe there is a critical need to challenge policies, practices, ideas and values that perpetuate inequality, prejudice and exclusion. Listening to the voices and perspectives of the most vulnerable and marginalised is critical to maintaining a healthy, fair and just society.*²⁰⁴

The Foundation of Alcohol Research and Education argued in its submission that advocacy in pursuit of a charitable purpose is a legitimate activity and that advocacy enables charities to address the causes of health, social and environmental problems, rather than just the symptoms.²⁰⁵ In a similar vein, Dementia Australia noted that it is ‘largely trying to advocate on behalf of vulnerable sections of our community who can’t advocate for themselves.’²⁰⁶

Encouragement for the participation of charities in public policy debate was suggested by the Refugee Council of Australia in its submission. It noted that promotion of advocacy as a charitable purpose arises under the Charities Act and not the ACNC Act, noting that there is a lack of clarity around the existing guidelines on permissible advocacy of charities.²⁰⁷

²⁰¹ ACNC submission to the Joint Standing Committee – Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, paragraph 13.

²⁰² Submission, COSS, received 28 February 2018, page 6.

²⁰³ Submission, ACT Government, received 28 February 2018, page 2.

²⁰⁴ Submission, Jesuit Social Services, 20 February 2018, page 2.

²⁰⁵ Submission, Foundation of Alcohol Research and Education, 28 February 2018, page 3.

²⁰⁶ Submission, Dementia Australia, 28 February 2018, page 2.

²⁰⁷ Submission, Refugee Council of Australia, received 28 February 2018, page 2.

Mental Health Australia (MHA) noted in its submission that it plays a significant role in advocating for systemic mental health reform. It stated that there is a lack of clarity in the public domain regarding what is systemic advocacy and what is 'political' advocacy. MHA further note that it would be a mistake if systemic advocacy to improve public policy became the victim of attempts to constrain political advocacy.²⁰⁸

The Australian Catholic Bishops Conference advised the Panel that charities should be free to advocate while not overstepping the mark and supporting or criticising specific political parties or candidates. It noted that the ACNC's current guide for charities, election and advocacy is useful.²⁰⁹

Further support that the current law and ACNC guidance provide appropriate boundaries for advocacy activities came from the Society of St Vincent de Paul who affirmed the independence of charities to advocate, stating that advocacy is a legitimate and important way for organisations to fulfil their charitable purpose.²¹⁰

Our consideration of the issues

Advocacy is a key aspect of a vibrant civil society and plays an important role in the development of social policy. It allows Australians to voice their concerns and influence public policy and legislative development. The role of advocacy by charities was acknowledged as integral to community wellbeing by the Productivity Commission.²¹¹

It is clear that governments rely on the sector for information to shape policy. Advocacy enables charities to advise and inform governments on options for policy and program development on issues where the sector has significant experience and expertise. The Panel is of the view that the development of good social policy is most effective where there is a collaborative and robust partnership between government, charities and the broader community.

During consultations, stakeholders drew attention to the key role that the sector has in advocating for the most vulnerable people in the community to enable policy makers to be aware of the challenges facing vulnerable groups that, in turn, can lead to significant policy and program development.

For example, the advocacy of people with disabilities, their families and carers, coupled with the expertise of peak organisations and service providers in the sector working with government over many years has led to the establishment of the NDIS in Australia.

There have been a number of cases that highlight the ambiguity around the threshold between issues-based advocacy which the vast majority of charities engage in, and activities undertaken to achieve a purpose which may turn into a political purpose in its own right, and could constitute a 'disqualifying purpose.'

This is a contested area of charity law where litigation would lead to greater clarity and certainty for the sector. There is a strong case for the ACNC being provided with resources to enable it to undertake test case litigation. The ATO has a Test Case Litigation Program which provides financial assistance to taxpayers to help them meet some or all of their reasonable litigation costs in cases that have broader implications beyond an individual dispute. This concept may be of assistance here.

Conclusions

There is a role for charities in advocacy to promote or oppose changes to any matter of law, policy or practice that is linked to their charitable purpose. However, there is ambiguity around the threshold

²⁰⁸ Submission, Mental Health Australia, 28 February 2018, page 2.

²⁰⁹ Submission, Australian Catholic Bishops Conference, 7 March 2018, pages 5-6.

²¹⁰ Submission, St Vincent de Paul Society National Council, received 18 March 2018, page 3.

²¹¹ Productivity Commission Research Report, 'Contribution of the Not-For-Profit Sector', January 2010, page 37.

between issues-based advocacy linked to a charitable purpose and activities undertaken to achieve a political purpose that constitute a disqualifying purpose.

The Commissioner must be resourced to enforce the law to prevent the misapplication of charitable assets for activities that would equate to disqualifying purposes.

There should be resourcing for the ACNC to enable appropriate test cases to be conducted to clarify the law on disqualifying purposes and other areas of public interest.

Recommendation 19

The ACNC be resourced to enable the Commissioner to enforce and develop the law where registered entities engage in disqualifying purposes (within the meaning of the *Charities Act 2013* (Cth)).

Recommendation 20

Test case funding be made available to develop the law in matters of public interest, including disqualifying purposes.

10. Criminal Misconduct

Introduction

Many Australian charities operate in, or send funds to, conflict zones and other unstable regions internationally. These are challenging environments, not only for service delivery but also for establishing and implementing governance structures and financial controls.²¹²

The Panel received briefings from both the ACIC and AUSTRAC during consultations. The ACIC advised of a small number of charities of interest with links to terrorism-related activities in the Middle East and Western Africa. It also identified a number of responsible persons²¹³ who are members of nationally significant organised crime groups with a suspected involvement in a range of criminal offending including the importation and distribution of illicit drugs, money laundering, tax fraud and people smuggling.

Australia's anti-money laundering and counter-terrorism funding regime is shaped by international standards established by the Financial Action Task Force (FATF).²¹⁴ The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and *Financial Transaction Reports Act 1988* (Cth) are the primary legislation to achieve compliance with these standards and provides Australia's regulatory regime to detect and deter money laundering and terrorism financing.

That legislation is augmented by Division 400 of the *Criminal Code Act 1995* (Cth) (Criminal Code) which provides the offence of money laundering and criminalises dealing with the proceeds of crime or an instrument of crime.

Division 103 of the Criminal Code contains specific offences for financing terrorism. In general terms, a person commits an offence if they make funds available to another person, provide funds or collect funds and are reckless as to whether they will be used to facilitate or engage in a terrorist act even if it does not occur. It is also an offence under section 102.6 of the Criminal Code if a person intentionally provides funds to a terrorist organisation.

AUSTRAC has a dual role as Australia's anti-money laundering and counter-terror financing regulator and financial intelligence agency. AUSTRAC supervises the compliance of entities that provide designated services (for example, banks and casinos) with their obligations under Australia's regime, particularly their obligation to assess and mitigate money laundering and terrorism financing risks.

The sector is not directly covered by the anti-money laundering and counter terror financing regime and is only regulated by AUSTRAC in limited circumstances. However, AUSTRAC does have visibility of the financial activities of a charity or not-for-profit where it occurs through regulated businesses (for example, through a bank account), or where it triggers the reporting of a 'suspicious matter report'²¹⁵ or cross-border movement of physical cash.

In April 2015, FATF released a Mutual Evaluation Report that found Australia was non-compliant with the international standard related to reducing the risk of terrorism financing through charities and

²¹² ACNC/AUSTRAC National Risk Assessment 2017 – Australia's Not-for-Profit organisation sector, Money laundering/terrorism financing, page 4.

²¹³ The persons responsible for the governance of registered entities are described in the ACNC Act as 'responsible entities'. However, in its educational and explanatory material the ACNC describes the people responsible for the governance of charities as 'responsible persons'. This Report generally uses the terminology of the ACNC in its educational and explanatory material (that is, responsible persons).

²¹⁴ FATF is an inter-governmental body established in 1989 to combat money laundering and the financing of terrorism and proliferation at the international level. Australia is a founding member of the FATF.

²¹⁵ A report that is submitted following suspicions that a customer or transaction is tied to a criminal offence including money laundering, terrorism financing or any other offence under a Commonwealth, State or Territory law.

not-for-profits.²¹⁶ As a result, AUSTRAC and the ACNC undertook a risk assessment of the sector which identified Australia as a ‘medium’ risk for both money laundering and terrorism funding.²¹⁷

The ACNC has established partnerships with AUSTRAC, the ATO, the AFP and the ACIC to target key risks in the sector including money laundering and terrorism financing.²¹⁸

Until recently, the ACNC could not directly access AUSTRAC information. However, the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* (Cth) was passed on 10 May 2018 which will make the ACNC a ‘designated agency’ for the purposes of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and provide the ACNC with direct access to AUSTRAC information. As a designated agency, the ACNC will then be able to better detect and monitor money laundering, terrorism financing and other criminal activities involving registered entities.

What we have heard

The ACIC noted that:

*... Australian charities have a long history helping the most vulnerable and disadvantaged, both in Australia and abroad. Many of these charities operate in, or send funds to, conflict zones and other unstable regions... These are necessarily challenging environments to operate in, not only for service delivery but also for establishing and implementing governance structures and financial controls.*²¹⁹

Humanitarian disasters offer opportunities for terrorist groups to get into conflict areas under the guise of providing humanitarian assistance, and to raise or send funds to these areas under the same cover.

The ACIC further noted:

*... Australian not-for-profit organisations remain vulnerable to the risk of money laundering and terrorism financing. While proven instances of money laundering and terrorism financing in this sector remain low, this illicit activity could severely damage public trust and confidence in the sector and harm the communities they are working to assist.*²²⁰

The Panel accepts the advice from the ACIC and AUSTRAC that there are vulnerabilities for the sector. The ACIC specifically identified four areas of concern that make Australia’s charity and not-for-profits sector vulnerable to terrorism-related activities:

- staff;
- governance;
- regulation; and
- high-risk operating environments.

In relation to staff, the ACIC noted that the current disqualifying criteria for a responsible person in governance standard 4 is narrow and excludes some serious offences and criminal behaviour. The ACIC recommend that the introduction of a ‘fit and proper’ person test be considered.²²¹ AUSTRAC also advised the Panel that the disqualifying criteria should be expanded.²²²

The ACNC’s submission raises concerns about the limited disqualifying offences for responsible persons and recommends that the ACNC Regulations be amended to provide additional suitability conditions for responsible persons, including that they do not have a conviction for a terrorism,

²¹⁶ FATF, Mutual Evaluation Report – Australia, Anti-money laundering and counter-terrorist financing measures, April 2015.

²¹⁷ ACNC/AUSTRAC National Risk Assessment 2017 – Australia’s Not-for-Profit organisation sector, Money laundering/terrorism financing.

²¹⁸ Submission, ACNC, received 19 January 2018, page 20.

²¹⁹ Submission, ACIC, March 2018, page 4.

²²⁰ Submission, ACIC, March 2018, page 4.

²²¹ Submission, ACIC, March 2018, page 5, 7.

²²² Consultation, AUSTRAC, Sydney, 2 March 2018.

terrorism financing or money laundering offence.²²³ The ACNC notes that the inclusion of terrorism, terrorism financing and money laundering offences as disqualifying offences would aim to address the specific risks of terrorism financing and money laundering in the sector.²²⁴

The Panel was informed that ‘some charities at greater risk of being exploited for terrorism financing are less likely to have robust or best practice corporate governance measures in place’²²⁵ and that the ACNC’s regulation based on size ‘may not adequately consider the risk posed by each charity, as the terrorism financing risks are unlikely to be related to the size of the charity.’²²⁶

The ACIC advised that:

*[S]maller charities are more likely to be at risk for exploitation for terrorism financing purposes because they are less likely to have the resources to ensure robust governance and risk assessment frameworks. Therefore, the application of enhanced regulatory obligations might best be decided based on risk, rather than charity size.*²²⁷

AUSTRAC advised the Panel that the economic value of suspected terrorism financing involving charities or not-for-profits is low compared with the economic size of the sector. This highlights the importance of identifying and targeting the subset of high-risk entities, rather than the whole sector.²²⁸

The ACIC also recommended ‘an enhanced risk-based regulatory model’ based on risk rather than size.²²⁹

*A regulatory framework that is based on a charity’s risk profile would offer policy responses with greater flexibility in application and reduce the impact on the areas of the sector with lower risks. A sector specific risk – based regulatory model would identify high risk charities based on specific risk indicators such as high-risk financial transactions operating in locations with proscribed terrorist organisations, and other criminal related risks such as fraud and money laundering. These risk indicators would inform the charity’s risk rating and determine the regulatory and compliance regime for the charity and its activities.*²³⁰

The ACIC considers that the ACNC has a role to play in contributing to Australia’s national security²³¹ and proposed a range of measures to enhance the ACNC’s access to criminal information and intelligence. These measures include obtaining access to selected criminal intelligence databases, the use of secondments, establishing information sharing schemes and closer integration with law enforcement agencies.²³²

The ACIC stated that charities operating in high risk locations were not necessarily aware of the inherent risks and had not introduced controls.²³³ Risk characteristics include the presence of proscribed terrorist organisations in the country of operation, recent terrorist attacks and close proximity to conflict zones or political and economic instability.²³⁴

*In order to minimise the likelihood of this sector being exploited in the future, countries such as Australia should use regulatory and legislative frameworks to limit the ability of individuals and groups to exploit humanitarian assistance in high-risk areas.*²³⁵

²²³ Submission, ACNC, received 19 January 2018, page 35.

²²⁴ Submission, ACNC, received 19 January 2018, page 35.

²²⁵ Submission, ACIC, March 2018, page 5.

²²⁶ Submission, ACIC, March 2018, page 6.

²²⁷ Submission, ACIC, March 2018, page 6.

²²⁸ ACNC/AUSTRAC National Risk Assessment 2017 – Australia’s Not-for-Profit organisation sector, Money laundering/terrorism financing, page 39.

²²⁹ Submission, ACIC, March 2018, page 6.

²³⁰ Submission, ACIC, March 2018, para. 24.

²³¹ Submission, ACIC, March 2018, page 6.

²³² Submission, ACIC, March 2018, page 8.

²³³ Submission, ACIC, March 2018, page 7.

²³⁴ Submission, ACIC, March 2018, page 7.

²³⁵ Rodger Shanahan, ‘Terrorist groups can exploit charities, even in Australia — but we can make it harder for them’, viewed 8 May 2018, <http://www.abc.net.au/news/2018-03-14/stopping-jihadists-exploiting-charities-to-fund-terrorism/9544082>.

AUSTRAC proposed amendments to require higher reporting obligations on entities that send money to countries on the DFAT sanctions list.²³⁶

The Department of Home Affairs advised the Panel that the ACNC legislation should be amended to formally recognise the important role that the ACNC plays in preventing and mitigating the financing of terrorism in Australia which the Department considers to be 'within the purview of the ACNC and its Commissioner'. The Department of Home Affairs suggested that the ACNC Act be amended to include an additional object to this effect.²³⁷

Our consideration of the issues

There were 4,255 registered entities (8.4 percent of all registered entities) that reported in 2016 that they were conducting activities overseas.²³⁸ Of those a small number are suspected by intelligence agencies of being involved in terrorism financing or money laundering. In most cases, it cannot be determined whether the entity itself is complicit, or whether individuals used their position in the entity, without the knowledge or support of the entity's responsible persons (or a majority the entity's responsible persons).²³⁹

The Panel supports the development of a risk-based regulatory approach for high-risk registered entities. This would be based on specific risk indicators such as high risk financial transactions; entities operating in locations where there are proscribed terrorist organisations or on the DFAT sanctions list; and other criminal activities such as fraud and money laundering. Measures may include mandatory registration, additional governance and reporting requirements, and setting training and development standards for staff.

The Panel does not consider counter-terrorism funding to be a core function of the ACNC and does not support an additional object in relation to national security issues or other criminal misconduct. However, the Panel does consider that the ACNC has a role in working collaboratively with the key agencies such as the ACIC, AUSTRAC and the AFP, and notes that this will require additional resources.

The Panel considers that a conviction for serious offences such as money laundering and terrorism financing should preclude someone from being a responsible person.

The Panel supports the initiatives proposed by the ACIC to enhance ACNC access to selected criminal intelligence databases, the use of secondments, establishing information sharing schemes and closer integration with law enforcement agencies.²⁴⁰ The ACNC will require additional resources to carry out these tasks.

Conclusions

The ACIC advised of a small number of charities of interest with links to terrorism-related activities. It also had identified a number of responsible persons who are members of organised crime groups with a suspected involvement in criminal offences such as the importation and distribution of illicit drugs, money laundering, tax fraud and people smuggling.

There is a need for the ACNC to work with the ACIC, AUSTRAC and the AFP to develop a regulatory model for high-risk charities based on indicators such as operations in locations with proscribed terrorist organisations or on the DFAT sanctions list, high-risk financial transactions or other criminal activities such as fraud and money laundering. Measures may include mandatory registration, additional governance and reporting requirements, and setting training and development standards.

²³⁶ Consultation, AUSTRAC, Sydney, 2 March 2018.

²³⁷ Submission, Department of Home Affairs, 30 April 2018.

²³⁸ ACNC, Charities Report 2016.

²³⁹ Consultation, ACIC, Sydney, 16 February 2018.

²⁴⁰ Submission, ACIC, March 2018, page 8.

Resources need to be provided to the ACNC to implement measures to enhance the ACNC access to information and intelligence, including access to selected criminal intelligence databases, the use of secondments, and establishing information sharing schemes with partner agencies.

The ACNC Regulations should be amended to include the following suitability conditions to be a responsible person:

- that the person does not have a ‘disqualifying conviction’ for a terrorism, terrorism financing, money laundering, fraud, importation or distribution of illicit drugs, or child sexual offence under Commonwealth, State or Territory law.

Recommendation 21

ACNC’s regulatory approach to high-risk registered entities be further developed in partnership with the Australian Criminal Intelligence Commission (ACIC), the Australian Transactions Reports and Analysis Centre (AUSTRAC) and other Commonwealth departments and agencies.

Recommendation 22

The ACNC be resourced to enhance its access to criminal intelligence databases, use of secondments and information sharing with the ACIC and other agencies.

Recommendation 23

The *Australian Charities and Not-for-profits Commission Regulations 2013* (Cth) be changed to disqualify a person from being a responsible person if they have a conviction for terrorism, terrorism financing, money laundering, fraud, importation or distribution of illicit drugs or a child sexual offence under Commonwealth, State or Territory law.

11. Beyond Charities

Overview

It is estimated that there are 600,000 not-for-profits in Australia.²⁴¹ Approximately 246,000 not-for-profits are endorsed by the ATO for tax concessions,²⁴² of which approximately 56,000 are registered under the ACNC Act.²⁴³

The sector can also be viewed on the basis of legal structure. There are approximately 7,500 companies limited by guarantee and 130,000 incorporated associations that are ‘non-charitable’, not-for-profits.²⁴⁴ In addition to these legal structures, there are not-for-profits formed under various State and Territory laws and some by their own statute.

Some of the sector also receives financial support from the community, through direct donations, government grants and tax concessions.²⁴⁵

Currently, most not-for-profits not registered under the ACNC Act self-assess their tax status and ability to access tax concessions. Business Activity Statement data provided by the ATO estimates there are 130,000 entities that self-assess to be income tax exempt, with approximately 580 not-for-profits having annual Goods and Services Tax (GST) turnover greater than \$5 million.²⁴⁶

Transition of not-for-profits into the ACNC

Introduction

Division 25 of the ACNC Act provides for entitlement to registration. Section 25-5 of the ACNC Act limits the entitlement to registration to entities that are ‘charities’ falling within the definition provided in the Charities Act. This limitation is explained in paragraph 3.27 of the Revised Explanatory Memorandum to the ACNC Bill which provides:

Initially, the ACNC will only register charities. Therefore, in order to be entitled to registration as a type of registered entity, an entity must be a charity. [Paragraph 25-5(1)(b)]

However, paragraph 1.3 of the Revised Explanatory Memorandum provides:

Initially, only tax endorsed charities will be regulated by the Australian Charities and Not-for-profits Commission (ACNC). However, the Bill establishes a regulatory framework that can be extended to all NFP entities in the future.

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.

It would be possible to extend the regulatory framework to not-for-profits, for example based on tax status, legal structure or revenue per annum.

What we have heard

While some stakeholders argued that the ACNC should remain focussed only on charities, at least for the foreseeable future, submissions supported the original intent of expanding the remit of the ACNC to include not-for-profits. One of the main arguments raised in favour of transitioning certain not-for-profits into the ACNC’s regulatory framework is that it will allow transparency, financial

²⁴¹ Productivity Commission Research Report, January 2010, ‘Contribution of the Not-for-profit Sector’, page 53.

²⁴² Submission, ATO, 30 April 2018.

²⁴³ ACNC website, <http://www.acnc.gov.au/ACNC/Home/ACNC/Default.aspx?hkey=3e39ac62-4f04-44fe-b569-143ca445c6bf>, viewed 10 May 2018.

²⁴⁴ Submission, ACNC, received 19 January 2018, page 17.

²⁴⁵ Submission, ATO, 30 April 2018.

²⁴⁶ Submission, ATO, 30 April 2018.

reporting and regulatory oversight of not-for-profits. There was a call for greater transparency and accountability of not-for-profits from both government and the community.²⁴⁷

The ATO noted that the current regulation of not-for-profits, particularly those entities with a large turnover, seems to lack alignment with charities registered under the ACNC Act in terms of the level of accountability and transparency.²⁴⁸

The Advisory Board stated:

The Act's full potential is yet to be utilised, particularly it's potential to regulate further not-for-profit entities other than charities.

...

*The Act envisages the ACNC registering, sustaining, and reducing red tape for all Australian not-for-profit entities, in addition to charities.*²⁴⁹

It was submitted to the Panel that consideration could be given to extending the scope of ACNC regulation to not-for-profits in a phased approach to certain types of entities.²⁵⁰ The phasing in could start with entities that claim tax concessions similar to many charities registered under the ACNC Act (that is, by virtue of being deductible gift recipients (DGRs) in accordance with Division 30 of the ITAA 1997 or exempt entities under Division 50 of the ITAA 1997 and research organisations under section 73A of the ITAA 1936) to determine which entities may be suitable for inclusion on the ACNC Register.²⁵¹

In consultations it was suggested that any transition should occur on a risk-based, regulatory and proportionate approach, irrespective of not-for-profit structure. Revenue was considered to be an indicator of risk: the larger the revenue, the greater the risk.

The ATO stated in its submission:

*Consideration could be given to extending the scope of ACNC regulation to other NFP entities. Under current tax law, most NFPs that are not charities can self-assess their access to NFP tax concessions, such as exemption from income tax. There are a number of NFP entities that have a significant turnover that are not required to register with the ACNC or be endorsed by the ATO to determine their entitlement to confirm their income tax exempt status. There is little transparency on their activities and operations as these entities don't need to report, other than to meet tax obligations such as pay as you go withholding and GST.*²⁵²

An estimate from 2017 Business Activity Statement data illustrates the numbers and annual turnover of larger entities that can self-assess. Of the 130,000 income tax exempt not-for-profits there are approximately 580 with estimated revenue (GST turnover) of \$5 million or more. Of these:

- less than 5 have over \$1 billion in revenue;
- 10 have between \$250 million and \$1 billion;
- 15 have between \$100 million and \$250 million;
- 200 have between \$10 million and \$100 million; and
- 350 have between \$5 million and \$10 million.²⁵³

²⁴⁷ For example, Submission, ATO, 30 April 2018; Submission, Justice Connect, received 28 February 2018.

²⁴⁸ Submission, ATO, 30 April 2018.

²⁴⁹ Submission, ACNC Advisory Board, 29 January 2018, pages 1 and 3.

²⁵⁰ Submission, ATO 30 April 2018; Submission, Prolegis Lawyers, 28 February 2018.

²⁵¹ Submission, Prolegis Lawyers, 28 February 2018.

²⁵² Submission, ATO, 30 April 2018, page 4.

²⁵³ Supplementary submission, ATO, 17 May 2018.

Our consideration of the issues

There is merit initially in migrating large income tax exempt not-for-profits to the ACNC rather than transferring all not-for-profits to the ACNC's regulatory framework at one time. Focusing on tax concession entities which have similar characteristics to many charities for Commonwealth law purposes is considered preferential. For consistency, the Panel has chosen a threshold of \$5 million or more which is in line with the reporting thresholds for large registered entities in chapter 6.

Conclusions

The Panel has taken the view that revenue size should be the basis upon which not-for-profits should be migrated to the ACNC. Based on information provided by the ATO, the Panel considers the entities to transition first could be the income tax exempt entities under Division 50 of the ITAA 1997, tax deductible entities under Division 30 of the ITAA 1997 and research organisations within section 73A of the ITAA 1936, with revenue of \$5 million or more per annum. As it is estimated that there are approximately 580 such entities, this should not create an unreasonable burden on the ACNC.

Definition of 'not-for-profits'

Introduction

Another key issue raised with the Panel was whether the term 'not-for-profits' should be defined within either the ACNC Act or the Charities Act.

To be entitled to be registered as a charity, and to maintain charity registration, an entity must meet the definition of 'charity' in the Charities Act.

The Charities Act definition preserves many of the charity law concepts developed through case law and the boundaries of the statutory definition of charity will therefore be determined by the courts.

Neither the ACNC nor the ATO currently operate with a statutory definition of 'not-for-profits.' The Commonwealth Parliament considered the introduction of a statutory definition in 2012 but elected not to pass the proposed definition into law.

What we have heard

In consultations and submissions, it was suggested that a similar definition to that considered by the Commonwealth Parliament previously should be recommended, but others had reservations. The submissions noted that any definition of 'not-for-profit' would need to be carefully considered and should be in alignment with other legislation.²⁵⁴ The Panel did not receive any detailed information from stakeholders suggesting that the absence of a statutory definition had given rise to major problems.

Through the course of consultations, challenges with a definition of 'not-for-profits' were raised. These challenges include the changing landscape of the sector and the need for any definition of 'not-for-profits' to be able to incorporate entities such as social enterprises and self-help groups with member benefits in certain cases.

Our consideration of the issues

The Panel considers that there are currently unclear areas of charity law where test case litigation in relation to not-for-profits could lead to greater clarity and certainty.

²⁵⁴ Submission, Governance Institute of Australia, 28 February 2018; Submission, Law Institute of Victoria, 16 March 2018.

The introduction of consumer directed care for the aged and the rollout of the NDIS for persons with disabilities are examples of where consumers may seek membership in the not-for-profit organisations that provide services to them. By virtue of becoming members of these organisations, certain benefits become available to them. Currently the ATO considers an entity is a not-for-profit if it is prevented by law, or its constituent documents, from distributing its profits or assets among its members. The effect of this could be that if consumers take membership in tax exempt not-for-profits, it could put the income tax exempt status of the entity at risk. The common law avoided the problem of member benefit in charities by focusing on purpose.

Social enterprises are increasingly a part of the not-for-profits landscape. There are an estimated 20,000 social enterprises (many of which are charities or tax exempt not-for-profits). The case law in relation to charities operating as social enterprises is underdeveloped.²⁵⁵ Legislation denying members the opportunity to benefit could adversely affect the development of the law around social enterprise and its interface with charity law.

Conclusions

The Panel considers there is benefit in allowing charity law to develop on a case by case basis and does not recommend a statutory definition of 'not-for-profits' at this time.

Adequate provision for litigation costs for the ACNC will enable appropriate test cases to be conducted to define what 'not-for-profits' means in a predominantly purpose-focussed body of law.

The Panel concludes that the definition of 'not-for-profit' is an area of public interest and is of the view that test case funding should be provided.

Recommendation 24

The ACNC Act be amended to provide that certain not-for-profits with annual revenue of \$5 million or more must be registered under the ACNC Act to be exempt from income tax and access Commonwealth tax concessions.

²⁵⁵ *Commission of Taxation v The Triton Foundation* [2005] 60 ALR 451.

PART C – RED TAPE REDUCTION

12. Fundraising

Introduction

The regulatory regimes for fundraising across State and Territory jurisdictions are inconsistent, complex and inefficient for charities. Fundraising provides a major opportunity in red tape reduction for charities in Australia, particularly for charities engaging in national fundraising or fundraising online. These charities spend significant time and resources navigating the myriad of regulatory requirements imposed by the different jurisdictions.²⁵⁶

In addition, technology and the digital economy are creating new opportunities for fundraising in ways that are not contemplated by the State and Territory statutes. Emerging issues such as crowd funding, commission-based face-to-face fundraising and third party commercial fundraising are changing the landscape and present new issues for regulators and standards of code.

There are seven different fundraising regimes across Australia. These regimes are outlined in the table below which reflects the numerous regulatory regimes for registration and reporting for fundraising activities.

Table 4: State fundraising legislation²⁵⁷

Regulator	Act	Interaction
Office of Regulatory Services (ACT)	<i>Charitable Collections Act 2003</i>	To apply for registration as a charity for fundraising purposes.
NSW Fair Trading	<i>Charitable Fundraising Act 1991</i>	To apply for registration as a charity for fundraising purposes.
Office of Fair Trading (QLD)	<i>Collections Act 1966</i>	To apply for registration as a charity for fundraising purposes.
Consumer and Business Services SA	<i>Collections for Charitable Purposes Act 1939</i>	To apply for registration as a charity for fundraising purposes.
Office of Consumer Affairs and Fair Trading (Tas)	<i>Collection for Charities Act 2001</i>	To apply for registration as a charity for fundraising purposes.
Consumer Affairs Victoria	<i>Fundraising Act 1998</i>	To apply for registration as a charity for fundraising purposes.
Consumer Protection Department of Commerce (WA)	<i>Charitable Collections Act 1946</i>	To apply for a licence for fundraising purposes.

Note: The Northern Territory does not regulate charitable fundraising.

The ACNC has made some progress in reducing red tape for fundraising with the South Australian Government, the ACT Government and the Tasmanian Government, and is in consultations with the Western Australian Government.

²⁵⁶ Statement on Fundraising Reform, #fixfundraising, Justice Connect.

²⁵⁷ ACNC, 27 July 2016, 'A Common Charity Definition?', Darwin Convention Centre, Darwin, presented by David Locke, Assistant Commissioner, ACNC.

South Australia – case study

On 24 May 2016, the South Australian Parliament passed the *Statutes Amendment (Commonwealth Registered Entities) Act 2016* (SA). It aims to remove duplication of reporting and licence requirements for charities registered under the ACNC Act.

The new law is simple in structure and purpose. It inserts clauses into the *Associations Incorporation Act 1985* (SA) (Associations Incorporations Act) to exempt entities registered under the ACNC Act from the reporting requirements under the Act. It also inserts similar clauses into the *Collections for Charitable Purposes Act 1939* (SA) to exempt entities registered under the ACNC Act from fundraising licencing and reporting requirements.

The removal of reporting requirements under the Associations Incorporations Act minimises the impact of ACNC regulation on the sector. The use of ACNC registration to remove the need for a South Australian fundraising licence is a good example of red tape reduction.

South Australian charities can still be incorporated under the Associations Incorporations Act, but once registered under the ACNC Act, charities simply report to the Commonwealth. Charities that previously required a fundraising licence are still required to notify the South Australian Minister if they intend to fundraise in South Australia but do not require a separate fundraising licence.²⁵⁸

South Australia also has a Code of Practice for Collections for Charitable Purposes which provides information on the required practices for collectors including the hours and location of collection activities, identification requirements for collectors, issuing of receipts and disclosure information by collectors.

Australian Consumer Law

The Australian Consumer Law (ACL) operates nationally under the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act). The ACL is applied to all jurisdictions through the *Australian Consumer Law Application Acts* that exist in all States and Territories and is wide in scope. For example, section 12 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) provides:

- (1) *The Australian Consumer Law (Victoria) applies to and in relation to—*
 - (a) *persons carrying on business within this jurisdiction; or*
 - (b) *bodies corporate incorporated or registered under the law of this jurisdiction; or*
 - (c) *persons ordinarily resident in this jurisdiction; or*
 - (d) *persons otherwise connected with this jurisdiction.*
- (2) *Subject to subsection (1), the Australian Consumer Law (Victoria) extends to conduct, and other acts, matters or things, occurring or existing outside or partly outside this jurisdiction (whether within or outside Australia).*

All of the State and Territory Application Acts are in similar terms. The extent to which a particular provision of the ACL applies to regulate the conduct of a person or entity (and the remedies that apply to any breach), depends on the wording of the particular provision. Many provisions of the ACL apply to conduct that is 'in trade or commerce.' This phrase has a wide meaning.

By way of example, a key provision of the ACL is subsection 18(1) which simply says: 'A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.' Section 2 defines 'trade or commerce' broadly, and includes 'any business or professional activity (whether or not carried on for profit)' and 'business' includes 'a business not carried on for profit.'

²⁵⁸ South Australian Council of Social Service, *Charities Reporting and Fundraising Red Tape Reduction – Factsheet*.

The raising of money by charities and not-for-profits is covered by subsection 18(1) as fundraising is usually a 'business or professional activity', whether or not the charity or not-for-profit is itself operating as a business or professional activity. It is the fundraising (the activity), rather than the charity or not-for-profit (the organisation, whatever its legal structure may be) that is the focus.

These broad definitions result in the misleading and deceptive conduct provision of the ACL applying to the fundraising activities of many charities and not-for-profits.²⁵⁹

The Consumer Affairs Australia and New Zealand (CAANZ) completed a review of the ACL in 2017. Following significant industry and stakeholder uncertainty, CAANZ recommended:

*Clarify through regulator guidance the current application of the ACL to the activities of charities, not-for-profit entities and fundraisers.*²⁶⁰

In response, 'A Guide to the Australian Consumer Law for fundraising and other activities of charities, not-for-profits and fundraisers' was issued by CAANZ in December 2017. The key points are as follows:

Generally, if a charity engages in a fundraising activity involving a supply of goods or services; or is a for-profit professional fundraiser; or is fundraising in an organised, continuous and repetitive way, then the fundraising activity is likely to be in 'trade or commerce' and the ACL obligations are likely to apply.

When the fundraising activity is in 'trade or commerce', the charity must not engage in misleading or deceptive conduct or unconscionable conduct.

Where the fundraising activity involves the supply of goods or services, the charity must not make false or misleading representations, or engage in unconscionable conduct in relation to the supply of the goods or services. It is also unlawful to harass or coerce someone in connection with the supply of, or payment for, those goods or services.

*In addition to the ACL, other State, Territory and Commonwealth laws are likely to apply to fundraising activities.*²⁶¹

What we have heard

The need for harmonisation of fundraising was raised in almost every consultation and was supported in over 35 of the written submissions made to the Panel.

A number of peak organisations including the Australian Council of Social Service, Australian Institute of Company Directors, Community Council for Australia, Chartered Accountants Australia and New Zealand, Justice Connect, CPA Australia and Philanthropy Australia have issued the 'Statement on Fundraising Reform' as part of the #fixfundraising campaign. Over 190 charities are signatories in support of the Statement²⁶² and the Law Council of Australia endorsed the #fixfundraising campaign in its submission to the Panel.²⁶³

The Statement calls for the Commonwealth, in partnership with the States and Territories, to develop a modern approach to fundraising regulation. It proposes the following three steps to achieve reform:

1. clarification and minor amendments to the ACL to ensure application to fundraising activities is clear and broad;
2. repeal of fragmented State and Territory fundraising laws; and
3. work with regulators and self-regulatory bodies to provide guidance to fundraisers to continue to improve fundraiser conduct.²⁶⁴

²⁵⁹ Statement on Fundraising Reform, #fixfundraising, Justice Connect.

²⁶⁰ Australian Consumer Law Review, Final Report, March 2017, page 76.

²⁶¹ Commonwealth of Australia (The Treasury), *A Guide to the Australian Consumer Law for fundraising and other activities of charities, not-for-profits and fundraisers*, December 2017.

²⁶² Justice Connect website, viewed 7 May 2018, <https://www.nfplaw.org.au/letter-prime-minister-and-heads-governments>.

²⁶³ Submission, LCA, 28 February, pages 15-16.

²⁶⁴ Statement on Fundraising Reform, #fixfundraising, Justice Connect.

Justice Connect noted in its submission to the Panel:

Not-for-profit Law has been working in collaboration with some of Australia's leading professional and peak bodies to improve the state of fundraising regulation in Australia, under the banner of #fixfundraising which has been increasingly supported by both charities and not-for-profits. The campaign proposes the Australian Consumer Law (ACL) be used to regulate fundraising, supported by necessary guidance (including codes of conduct for all fundraisers and fundraising activities) and the repeal of State and Territory fundraising laws. The campaign led to confirmation by Consumer Affairs Australia and New Zealand (CAANZ) that 'in many cases the activities of fundraisers in seeking donations are captured by general provisions of the ACL' (despite the lack of guidance on its application). In December 2017, guidance was issued, and there is agreement by CAANZ to a project in 2018-2019 to "consider the effectiveness of the guidance".²⁶⁵

The Australian Catholic Bishops Conference supported the call to bring all charity fundraising activities under one national framework, noting that the fragmented approach due to differences between various States and Territories poses a severe compliance burden on charities that engage in large scale mass market fundraising.²⁶⁶

The Governance Institute of Australia suggested fundraising reform in line with the three steps included in the Statement on Fundraising Reform to create a nationally-consistent regulatory regime.²⁶⁷

The Fundraising Institute of Australia (FIA) suggested the promotion of best practice and ethical conduct in fundraising. It supported the inclusion of harmonisation of fundraising and reduction of red tape on the Council of Australian Governments (COAG) agenda, and the establishment of a COAG Working Group. FIA also suggested that the Charity Portal be used as a 'one stop' platform to register fundraising campaigns in compliance with State and Territory requirements.²⁶⁸

The Prime Minister's Community Business Partnership suggested that the definition of 'trade and commerce' be amended to clarify what not-for-profit activities might qualify as trade and commerce; endorsed reform of the fundraising licence regime, noted that harmonisation of fundraising through the adoption of a model act should be an early priority for governments, and agreed that fundraising should fall within the ACL provisions and State and Territory fundraising laws should be repealed, with the ACNC being the regulator of fundraising activities.²⁶⁹

The QLS noted that the 'idea of modest amendment to the ACL alongside a Mandatory Code under the ACL framework with enforcement delegated to the ACCC and the State and Territory Consumer Law authorities seems to QLS to be an eminently sensible regulatory approach should each of the States and Territories repeal their fund raising regulation.' QLS further noted that the ACCC (and State and Territory Consumer Law authorities) are already involved in fundraising regulation as has been made clear in recent guidance published by the ACCC.²⁷⁰

However, among the numerous calls of support for the ACL approach, the ACCC was a dissenting voice, rejecting the proposed reforms. The ACCC stated:

We do not support using the ACL as a replacement for state and territory fundraising legislation. The ACL and state and territory fundraising legislation are fundamentally different. The ACL is a law of general application intended to impose minimum standards of conduct across all sectors of the economy. On the other hand, state and territory fundraising legislation focussing on licensing and registration and related ongoing obligations such as financial reporting. Unlike the ACL, state and territory fundraising legislation is designed to promote transparency, accountability and good

²⁶⁵ Submission, Justice Connect, February 2018, page 14.

²⁶⁶ Submission, Australian Catholic Bishops Conference, 7 March 2018.

²⁶⁷ Submission, Governance Institute of Australia, 28 February 2018, page 5.

²⁶⁸ Submission, Fundraising Institute, 27 February 2018, page 5.

²⁶⁹ Submission, Prime Minister's Community Business Partnership, received 8 March 2018.

²⁷⁰ Supplementary submission, QLS, 27 April 2018.

governance for the sector. The ACL is not designed to address the public's ongoing demand for greater accountability in the charities, not-for-profits and fundraising sector.

Economy wide regulators, such as the ACL regulators, cannot replicate the focus and expertise that specialist regulators deliver. Specific issues related to fundraising should be dealt with in fundraising specific legislation and enforced by relevant specialised state and territory agencies, and, to the extent that they involve charities registered under the ACNC legislation by the ACNC.²⁷¹

In a supplementary submission, the ACCC stated that if the ACL is adopted, it 'will leave large regulatory gaps and lead to less accountability and poorer, not improved, behaviour'.²⁷² The ACCC maintains that '[i]t is, and has always been, open to state and territory governments to harmonise and modernise their NFP sector legislation and ensure that the regulations correctly balance public protection and regulatory burden.'²⁷³

Our consideration of the issues

The ACNC legislation does not regulate fundraising activities. However, the Panel has considered fundraising as part of this Review due to the direct impact that the current framework has on the sector, object 3 of the ACNC Act ('to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector') and the overwhelming stakeholder concerns raised.

The Panel supports the recommendations in relation to fundraising regulation made by the Hon PA Bergin SC in the Report of the Inquiry under the *Charitable Fundraising Act 1991* (NSW) into The Returned and Services League of Australia (New South Wales Branch) and related entities.²⁷⁴ The Panel considers that the following recommendations are particularly noteworthy:

Recommendation 14.7

It is recommended that NSW Fair Trading liaise with the ACNC and any other entity, including the Fundraising Institute of Australia, to develop clear guidance for charitable fundraising organisations in respect of political donations and attendance at political functions.

Recommendation 14.8

It is recommended that consideration be given to the introduction of a single, unified Australian statutory regime for the regulation of charitable fundraising.

Recommendation 14.9

It is recommended that consideration be given to simplifying the regime established by the Act by removing duplication and overlapping provisions.

Recommendation 14.10

It is recommended that consideration be given to the consolidation of the conditions of fundraising authorities including, but not limited to, the process of obtaining an authority, any exemptions, ensuring donations can be traced, the deduction of expenses, applying proceeds to the intended or represented purpose, maintaining proper records and reporting.

However, at this stage, the Panel considers that the most appropriate mechanism for fundraising reform is through the ACL framework. The Panel formed this view for a number of reasons including:

- the ACL provides a modern, principles-based approach to regulation;
- it can apply to any person (individual, corporate, or resident overseas) that operates across state jurisdictions in Australia or online;

²⁷¹ Submission, ACCC, 27 February 2018, page 2.

²⁷² Supplementary submission, ACCC, 16 May 2018, page 1.

²⁷³ Supplementary submission, ACCC, 16 May 2018, page 1

²⁷⁴ The Hon P A Bergin SC, 'Report of the Inquiry under the Charitable Fundraising Act 1991 into The Returned and Services League of Australia (New South Wales Branch), RSL Welfare and Benevolent Institution and RSL LifeCare Limited', January 2018, recommendations 14.7 to 14.10.

- it is well understood legislation which is easy to explain to fundraisers, donors and the public;
- it allows for the development of voluntary and mandatory industry codes which would be helpful in the fundraising context; and
- the current regulatory approach of the State and Territory Consumer Law authorities is a risk-based, proportionate approach that the Panel considers appropriate for the regulation of fundraising.²⁷⁵

The Panel was not convinced by the ACCC's proposition in its submission that the ACL should not replace the State and Territory fundraising legislation (at least insofar as that legislation applies to entities registered under the ACNC Act).²⁷⁶

The ACCC commented in its submission that '[t]he ACL is not designed to address the public's ongoing demand for greater accountability in the charities, not-for-profits and fundraising sector.'²⁷⁷ However, the Panel found the advice provided in 'A Guide to the Australian Consumer Law for fundraising and other activities of charities, not-for-profits and fundraisers' to be compelling in relation to the application of the ACL to fundraising and other activities of charities that occur in 'trade and commerce'. The Panel notes that the key element is the *activity*, that is, the fundraising activity which must be deemed 'trade and commerce' to trigger application of the ACL, and importantly, there are no exclusions or restrictions as to the *entity* involved, that is, the ACL can apply to charities.

The Panel notes the ACCC's position that it is a generalist regulator and therefore should not regulate the specific area of fundraising. However, the ACCC's research into commission-based fundraising by charities found that many charities are engaging third-party commercial fundraising agencies to solicit ongoing donations.²⁷⁸ This research supports the argument that the ACL applies given it further strengthens the link to 'trade and commerce.'

The Federal Court decision in *Director of Consumer Affairs Victoria v Gibson [2017] FCA 240* demonstrates that the ACL can be used to prosecute misleading and deceptive conduct by fraudulent persons purporting to be charity fundraisers.

*The Federal Court's finding shows that the nationwide ACL is well up to the task when it comes to prosecuting fundraising misbehaviour in the not-for-profit sector, and that the Victorian Commissioner for Consumer Affairs was right to use it in Belle Gibson's case rather than the state-based Fundraising Act.*²⁷⁹

The Panel supports the development of an industry Code of Conduct, noting that, for example, the South Australian Code of Practice²⁸⁰ is made under the *Collections for Charitable Purposes Act 1939* (SA) and covers issues such as hours and location of collection activities and the promotion of collection activities. The Panel agrees that responsibility for these issues, as well as enforcement, should be retained by the States and Territories.

Alternatively, an Industry Code could be prescribed in a Regulation under the Competition and Consumer Act, either as a voluntary or mandatory Code. The Panel notes that Industry Codes under the Competition and Consumer Act are enforced by the ACCC rather than under the multi-regulator model. However, other options such as a legislative delegation to State and Territory regulators could be considered, similar to the delegation of certain powers and functions to ASIC.

In her opening address to the National Consumer Congress in March 2017, the Minister for Consumer Affairs in Victoria, the Hon Marlene Kariouz MP, said she supported the community sector's

²⁷⁵ Supplementary submission, Justice Connect, 20 April 2018, page 3.

²⁷⁶ Submission, ACCC, 27 February 2018, page 2.

²⁷⁷ Submission, ACCC, 27 February 2018, page 2.

²⁷⁸ Frost and Sullivan for ACCC, November 2017, 'Research into the Commission-based Charity Fundraising Industry in Australia', page 7.

²⁷⁹ Linda Caneva (2017), *Court Rules on Belle Gibson Charity Deception*, viewed 10 May 2018, <https://probonoaustralia.com.au/news/2017/03/court-rules-belle-gibson-charity-deception/>.

²⁸⁰ Government of South Australia (Attorney-General's Department), *Code of Practice – Collections for Charitable Purposes Act 1939*, viewed 7 May 2018, https://www.cbs.sa.gov.au/assets/files/Charities_CodeofPractice_2013.pdf.

call in relation to fundraising to ‘overhaul this aspect of the Australian consumer law.’²⁸¹ The Hon Marlene Kariouz MP also said that she hoped that her colleagues in other jurisdictions shared the same view, and most importantly that she would ‘continue to advocate for national reform while taking appropriate action to remove red tape for charities and not-for-profits operating in Victoria’.²⁸²

In consultations with the Panel, the Hon Matt Kean MP, NSW Minister for Innovation and Better Regulation, indicated support for national reform of fundraising.

The Panel is encouraged by these statements and hopes that progress can be made expeditiously toward a national fundraising regime for charities and not-for-profits situated within the ACL.

It must be noted that the Panel did not receive any compelling arguments against the use of the ACL as a regulatory framework for fundraising. Neither the ACCC submission nor any of the submissions in support of the ACL proposal directed the Panel to any unintended consequences that may flow from adopting this approach. Given the time constraints, the Panel did not explore any potential unintended consequences, but is confident that these issues will be considered prior to implementation.

The ACCC’s supplementary submission states that ‘it is, and has always been, open to state and territory governments to harmonise and modernise their NFP sector legislation’. The Panel observes that even though the problem has existed over many decades, the States and Territories have not harmonised their charity (including fundraising) legislation. The Panel considers that the most pragmatic way forward at this time is to clarify amendments to the ACL and repeal fragmented State and Territory fundraising laws.

The ACL proposal would not require the States to refer legislative powers to the Commonwealth, although some amendments to the State and Territory fundraising legislation would complement the use of the ACL (for example, exempting entities registered under the ACNC Act from registration, licensing and reporting requirements similar to the South Australian case study above).

However, as discussed in chapter 14, the Panel considers that the longer-term goal should be a referral of powers to the Commonwealth to enable a complete national regulatory scheme for charities and not-for-profits. Fundraising is one of the key issues that demonstrates the need for a national scheme.

Conclusions

The Commonwealth Government has an opportunity to reduce red tape for the sector by taking a leadership role in working with State and Territory governments to harmonise fundraising laws. By amending the ACL to ensure application to fundraising activities, working with the States and Territories to repeal or amend existing fundraising laws, and developing a mandatory Code of Conduct, the Commonwealth can significantly reduce the administrative burden on the sector.

A mandatory Code of Conduct on fundraising should be developed as a priority. Whether the Code sits under State and Territory fundraising legislation as a Uniform Code, or the Competition and Consumer Act, the Panel would expect that it would reflect best practice, and be flexible enough to set ethical standards in relation to new and emerging technologies and practices, such as crowd funding, commission-based face-to-face fundraising, telephone fundraising and third party commercial fundraising. Local councils should be involved in the development of the Code to ensure that public nuisance issues of fundraising in public spaces are addressed. The Panel considers that the responsibility for enforcement remains with State and Territory regulators.

²⁸¹ Linda Caneva (2017), *Court Rules on Belle Gibson Charity Deception*, viewed 7 May 2018, <https://probonoaustralia.com.au/news/2017/03/court-rules-belle-gibson-charity-deception/>.

²⁸² Linda Caneva (2017), *Court Rules on Belle Gibson Charity Deception*, viewed 7 May 2018, <https://probonoaustralia.com.au/news/2017/03/court-rules-belle-gibson-charity-deception/>.

Both Victoria and New South Wales have indicated support for national reform of fundraising legislation and the ACNC has made some progress with South Australia, Tasmania and the ACT. Leadership from the Commonwealth will build on this progress and see the move toward a national scheme come to fruition.

Recommendation 25

The Australian Consumer Law be amended to clarify its application to charitable and not-for-profit fundraising and a mandatory Code of Conduct be developed.

13. One-Stop-Shop

Overview

The ACNC undertakes a number of activities that relate to its object to 'promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector' or reduce red tape.

In 2010, the Productivity Commission recommended the adoption of the principle of 'report once use often' to minimise compliance costs to charities and maximise the value of data collected from them.²⁸³ The principle of 'report once, use often' or the concept of a one-stop-shop for charities aims to reduce red tape for the sector.

The ACNC's red tape reduction work includes:

- sharing information with other government agencies to build a 'report once, use often' framework using the ACNC Charity Passport;
- streamlining reporting arrangements for registered entities regulated by other Commonwealth agencies;
- harmonising ACNC regulatory requirements across State and Territory jurisdictions;
- commissioning research on red tape reduction in the sector to inform current and future work; and
- providing guidance and advice to registered entities to help them meet their regulatory obligations.²⁸⁴

The ACNC has worked with the States and Territories to reduce regulatory red tape in the areas of compliance and fundraising, which is discussed in chapter 12. The ACNC has also established a research program to measure the red tape burden on charities and identify target areas for red tape reduction.

The ACNC reports on its performance in reducing red tape in its annual reports.

²⁸³ Productivity Commission Research Report, January 2010, *Contribution of the Not-for-profit Sector*, recommendation 5.3, page XLII.

²⁸⁴ ACNC website, viewed 30 May 2018, http://www.acnc.gov.au/ACNC/About_ACNC/Redtape_redu/ACNC/Report/Red_tape.aspx.

Charity Passport

Introduction

The principle of 'report once, use often' is reflected in the Commonwealth Grants Rules and Guidelines 2017 (CGRGs) which provide a policy framework that includes both mandatory requirements and better practice principles in relation to grants.

The 2017 CGRGs include the following as a better practice principle (rather than a mandatory requirement):

*Officials should seek to minimise red-tape and duplication. In particular, they should not seek information from grant applicants and/or grant recipients that is collected by other parts of the entity or other Commonwealth entities and is available to them.*²⁸⁵

In accordance with the CGRGs and in pursuit of its red tape reduction objective, the ACNC has developed the Charity Passport.

The Charity Passport is a file transfer protocol process for reducing red tape for charities by enabling authorised government agencies to access ACNC data. This reduces the amount of information that registered entities must provide to different government agencies and is in line with the 'report once, use often framework'.²⁸⁶ It provides a more streamlined means of data exchange for government agencies dealing with multiple registered entities.

Under section 150-50 of the ACNC Act, the ACNC may disclose information that has already been made lawfully available to the public where disclosure is for the purposes of the ACNC Act. It can also disclose public and non-public information to another government agency in certain circumstances.

The Charity Passport data is collated from a range of sources including the ACNC registration application form, AISs, annual financial reports and updates provided to the ACNC by registered entities.²⁸⁷ The Charity Passport data contains publicly available corporate, financial and activity information of charities registered under the ACNC Act.²⁸⁸ Non-public information required by an authorised agency (such as withheld information, additional corporate/financial information and detailed registration information) is only provided by the ACNC upon request in specified circumstances and subject to conditions.²⁸⁹

²⁸⁵ Paragraph 8.4 of the CGRGs.

²⁸⁶ ACNC website, viewed 30 May 2018, http://acnc.gov.au/ACNC/About_ACNC/Redtape_redu/Charity_Passport/ACNC/Edu/Charity_Passport.aspx.

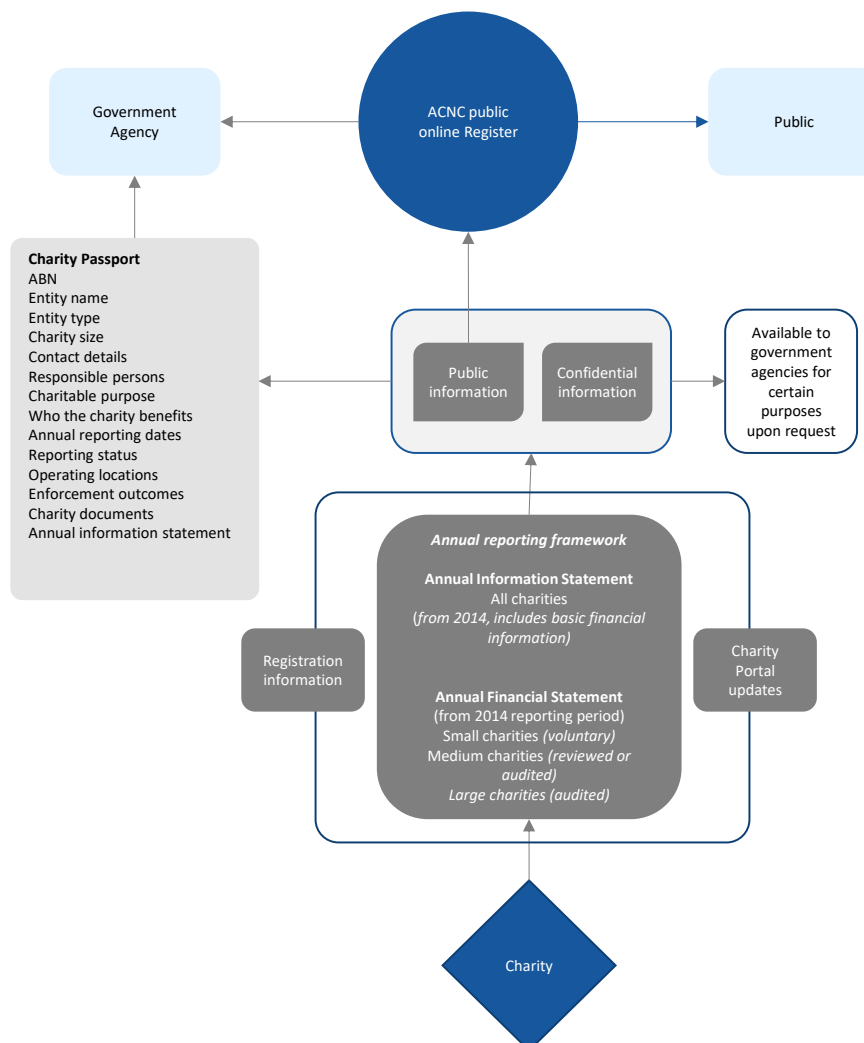
²⁸⁷ ACNC website, viewed 30 May 2018, http://acnc.gov.au/ACNC/About_ACNC/Redtape_redu/Charity_Passport/ACNC/Edu/Charity_Passport.aspx.

²⁸⁸ ACNC, (2017), *Report Once Use Often: Charity passport guidance for government*, page 7.

²⁸⁹ ACNC, (2017), *Report Once Use Often: Charity passport guidance for government*, page 11.

The figure below provides an illustration of the information collection process by the ACNC and the data sharing process between the ACNC and government agencies.

Figure 1: Information collection and data sharing processes²⁹⁰



The ACNC’s ‘Report Once, Use Often: Charity passport guide for government agencies’ provides guidance to government agencies on the use of the Charity Passport and notes paragraph 8.4 of the CGRGs:

Commonwealth officials should not seek information from registered charities that is collected by the ACNC and available in the Charity Passport.²⁹¹

The ACNC requests government agencies to incorporate the Charity Passport in its efforts to reduce reporting red tape imposed on registered entities.²⁹²

²⁹⁰ ACNC, (2017), *Report Once Use Often: Charity passport guidance for government*, page 6.

²⁹¹ ACNC, (2017), *Report Once Use Often: Charity passport guidance for government*, page 18.

²⁹² ACNC, (2017), *Report Once Use Often: Charity passport guidance for government*, page 19.

What we have heard

A number of submissions support reducing the regulatory burden that is duplicative. The Independent Schools Council of Australia succinctly framed the issue as:

*The reporting of the same or of similar information already reported under the requirement of other Australian Government authorities, is an unnecessary duplication.*²⁹³

Some recognised the work done to date by the ACNC on reducing the regulatory burden on registered entities and suggested that the ACNC needs to be better resourced to undertake its third object of reducing unnecessary regulatory obligations.²⁹⁴

In its submission, the ACNC stated that better promotion of the Charity Passport by the Commonwealth, States and Territories could reduce the regulatory burden on registered entities.²⁹⁵ This was supported by the Prime Minister's Community Business Partnership:

*...there is considerable opportunity to increase the use of the ACNC Charity Passport, with the potential to use the Charity Passport as a mandatory requirement for funding purposes across the Commonwealth Government...*²⁹⁶

There was support for greater transparency on the progress of red tape reduction. This may require regular reporting of progress on the negotiations with States and Territories on a one-stop-shop portal or a strategic plan to ensure that all levels of government are accountable for red tape reduction.²⁹⁷

The Victorian Council of Social Service noted that the use of the Charity Passport is a better way to reduce the regulatory burden on small and very small charities.²⁹⁸

Our consideration of the issues

The Panel fully supports the use of the Charity Passport and considers that it is currently under-utilised by government agencies. Therefore its effectiveness in reducing red tape has been limited.

In a 2016 Estimates hearings before the Senate Economics Legislation Committee, the then Commissioner of the ACNC stated that:

*The Charity Passport is still alive and operational. There are 40 offices across six Commonwealth and seven state and territory agencies who are accessing the Charity Passport to use in their work ... it is definitely a means of reducing administrative requirements that are made on charities. ... A lot of agencies at Commonwealth and state and territory level access the register as a means of quality assurance before they give grants or engage a charity in a contract.*²⁹⁹

Currently only four out of 18 Commonwealth departments use the Charity Passport which underlines the need for this to be a mandatory requirement.³⁰⁰

Some of the factors that have inhibited the uptake by government agencies of the Charity Passport to date have been:

- its inclusion as a better practice principle rather than a mandatory requirement under the CGRGs for Commonwealth agencies; and
- the resourcing constraints of the ACNC in relation to red tape reduction and promotion of the Charity Passport.

²⁹³ Submission, Independent Schools of Australia, 28 February 2018, page 7.

²⁹⁴ Submission, Moores, 27 February 2018.

²⁹⁵ Submission, ACNC, received 19 January 2018, recommendation 20, page 49.

²⁹⁶ Submission, Prime Minister's Community Business Partnership, page 8.

²⁹⁷ Submission, Professor David Gilchrist, 28 February 2018.

²⁹⁸ Submission, Victorian Council of Social Service, 15 March 2018.

²⁹⁹ S Pascoe AM, Senate Estimates, Economics Legislation Committee, 10 February 2016.

³⁰⁰ These figures were provided to the Panel upon request on 30 April 2018.

An Ernst & Young report to the ACNC highlighted the need for CGRGs to be mandatory and identified duplication in reporting requirements as a key source of red tape:

The charity regulator should work together with funding departments and agencies to encourage the adoption and implementation of available tools (such as the Commonwealth Grants Rules and Guidelines, the charity passport and the National Standard Chart of Accounts) to reduce the reporting burden on charities. The charity regulator could achieve this through a mixture of promoting agencies/programs that represent ‘best practice’ and reviewing agencies and programs to identify areas for improvement.³⁰¹

This Ernst & Young recommendation was not implemented, and the 2017 CGRGs were not updated to reflect more prescriptive and mandatory provisions to reduce the red tape on registered entities. Mandating the use of the Charity Passport by Commonwealth agencies would be the most effective way to reduce red tape for the sector. The Panel considers that the States and Territories, through COAG, should be encouraged to use the Charity Passport.

An ACNC Report on faith-based charities stated that they primarily report to the Department of Jobs and Small Business (31 percent), the Department of Health (27 percent), the Department of Social Services (25 percent) and ASIC (16 percent).³⁰² The Panel considers the reporting of faith-based charities to Commonwealth agencies is indicative of the reporting of the wider sector. Accordingly, the Panel considers that it may be useful for the ACNC to work with these agencies to integrate the Charity Passport information with government contract information.

In this context, the Panel notes the recent announcement by the Commonwealth Government in response to the Productivity Commission’s Data Availability and Use Inquiry. The response affirms the Commonwealth Government’s commitment to data reform, including implementing a simpler and more efficient data sharing and release framework within government.³⁰³

Conclusions

The Panel strongly supports the use of the Charity Passport as a way of reducing red tape. The most effective way to reduce red tape for the sector is for the Commonwealth Government to mandate, in the CGRGs, that departments and agencies are required to use the Charity Passport by becoming a Charity Passport Partner and must not seek information from registered entities that is already collected by the ACNC and available in the Charity Passport.

With respect to contract information, the ACNC should work with key Commonwealth departments and agencies to integrate the Charity Passport information with government contract information.

Recommendation 26

The use of the Charity Passport by Commonwealth departments and agencies be mandated.

³⁰¹ Ernst & Young, (2014), *Research into Commonwealth Regulatory and Reporting Burdens on the Charity Sector*, page 7. The Panel notes that the Charity Passport was implemented in June 2014 and Ernst & Young’s report was issued in September 2014.

³⁰² Knight, P.A and D.J. Gilchrist, (2015), *Australia’s Faith-based Charities 2013: A summary of data from the Australian Charities 2013 Report*, prepared for the Australian Charities and Not-for-profits Commission, page 22.

³⁰³ Minister for Human Services, 1 May 2018, viewed 30 May 2018: <https://www.mhs.gov.au/media-releases/2018-05-01-government-response-productivity-commission-inquiry-data-availability-and-use>

ACNC and ASIC Interface

Introduction

A major issue in relation to red tape reduction is the interface between the ACNC and ASIC. Charities that are incorporated under the Corporations Act are regulated by ASIC under the *Australian Securities and Investments Commission Act 2001* (Cth) and the Corporations Act. This is in addition to being regulated by the ACNC.

Among other things, ASIC is required to receive, process and store information efficiently and quickly and make information about companies and other bodies available to the public as soon as practicable.³⁰⁴

Currently a charity that is a company must register with ASIC to establish a legal entity, and then apply for registration with the ACNC to obtain charitable status. ASIC continues to oversee the corporate status of any charitable company while the ACNC oversees the charitable status, governance requirements and modified reporting obligations.

Under section 111L of the Corporations Act, companies that are registered under the ACNC Act are not required to notify ASIC of certain matters, including change of address and the retirement and appointment of directors and company secretaries. Consequently, ASIC may not have up to date information on its registers for charitable companies.³⁰⁵

What we have heard

The practical difficulties of the public relying on the outdated ASIC register rather than the ACNC Register was highlighted by Relationships Australia South Australia (RASA) in its submission. RASA noted that despite keeping the ACNC Register updated, the execution of documents in accordance with section 127(1) of the Corporations Act was not able to be undertaken as third parties could not align the directors executing the documents with the directors listed on the ASIC register. In its submission, RASA noted that:

*We were advised by the ACNC in August 2017 that ASIC have indicated that they will not commit to updating their records to reflect alterations submitted to the ACNC concerning the directorship of companies limited by guarantee that are registered as charities with the ACNC.*³⁰⁶

This difficulty was also raised in the QLS submission:

*The lack of alignment between the two registers causes significant practical and administrative challenges for registered charities and this needs to be addressed.*³⁰⁷

A consistent theme in submissions and consultations was that companies registered under the ACNC Act should be removed from the ASIC register, making the ACNC Register the primary source of information relating to all charities.

During consultations, ASIC stated that it is not the regulator with primary responsibility for charities and would not object if regulatory responsibility for companies registered under the ACNC Act rested primarily with the ACNC in the first instance. ASIC considers that the ACNC should be well placed to manage enforcement procedures, but criminal offences under the Corporations Act should remain solely within the remit of ASIC.³⁰⁸

The LCA has advised that there should be only one form required to register a charitable company in order to remove the duplication of process and information currently required in completing both the

³⁰⁴ Submission, ASIC, 8 March 2018.

³⁰⁵ Submission, ASIC, 8 March 2018.

³⁰⁶ Submission, Relationships Australia South Australia, 23 February 2018, page 2.

³⁰⁷ Submission, QLS, 28 February 2018, Appendix, page 4.

³⁰⁸ Consultation, ASIC, Melbourne, 16 March 2018.

ASIC form and the ACNC form. A similar approach has been shown to work in the way the income tax exemption and DGR application forms have been merged into the ACNC application.³⁰⁹

Our consideration of the issues

Registration as well as regulatory responsibility for companies registered under the ACNC Act should primarily rest with the ACNC rather than ASIC. Companies registered under the ACNC Act should be excluded from the ASIC register. This should provide the clearest indication to the users of both registers as to which agency is responsible and which register is the primary source for obtaining information.

Conclusions

Companies registered under the ACNC Act should be excluded from the ASIC register. However, criminal offences under the Corporations Act for such companies should remain within the remit of ASIC.

Recommendation 27

Responsibility for the incorporation and all aspects of the regulation of companies which are registered entities be transferred from the Australian Securities and Investments Commission (ASIC) to the ACNC, except for criminal offences.

³⁰⁹ Submission, LCA, 28 February 2018.

14. A National Scheme

Introduction

As a Federation, Australia has a number of regulatory regimes which are not controlled by a single statute, authority or government. In recent times there has been a gradual move towards Australia's regulatory regimes becoming increasingly standardised. This has typically occurred through three mechanisms:

- the referral of powers by the States to the Commonwealth under section 51(xxxvii) of the Constitution;
- the use of a constitutional head of power by the Commonwealth to legislate in different areas; and
- through harmonisation processes often facilitated by COAG.

Australia currently has eight separate jurisdictions whose regulatory regimes impact upon registered entities, with Commonwealth regulatory requirements through the ACNC Acts overlaying each of these regimes.

Separate bodies in the States and Territories are responsible for different parts of charities and not-for-profits regulation. Therefore, while the various regimes in the States and Territories contribute to the cost of compliance, the requirement to report to more than one regulator within one jurisdiction also adds to this cost, although this is not unique to the sector.

Charities and not-for-profits, as with entities in other sectors, are required to report to one body with respect to their incorporation, and others for matters such as fundraising, taxes and tax concessions, consumer law and fair trading, raffles and gaming and financial reporting. While it may not be appropriate to seek to combine all of these functions into one agency, the sheer number of regulators that charities or not-for-profits operating nationally may have to contend with clearly creates unnecessary burden.

What we have heard

The objective of a national scheme that promotes good governance, accountability and transparency for charities and not-for-profits to maintain, protect and enhance public trust and confidence in the sector is strongly supported. The ACNC has demonstrated the value of having a national regulator in supporting this objective. In particular, the elimination of duplication and overlap across layers of government has been reinforced.

The Advisory Board noted:

Recognising not-for-profit registration and oversight and fundraising regulation remain roles of the State and Territory law, the review of the Act offers, perhaps, the only opportunity in the foreseeable future for the effort to be directed to seeking Federation agreement about the ACNC being the one stop shop for both charities and not-for-profit organisations. A one stop shop could be achieved either through referral of registration, oversight, and fundraising powers to the Commonwealth. Constitutional referral should be the primary goal. As a lessor but more achievable second goal, referral of administrative functions relation to registration and fundraising to the ACNC and retention of constitutional authority by States and Territories should be considered.³¹⁰

³¹⁰ Submission, ACNC Advisory Board, 29 January 2018, page 3.

The ACT Government has worked closely with the ACNC to streamline the regulatory requirements applying to ACT-based registered entities, in particular their reporting obligations. This streamlining process has been welcomed by ACT-based registered entities as a positive step.³¹¹

It is clear that the ACNC should remain the key enabler for states and territories to streamline their own regulation and increase consistency with each other and the Australian Government in order to reduce complexity for the sector. This is particularly the case given the increasingly cross-jurisdictional role played by many charities.³¹²

...

The continued enhancement of the ACNC legislation, and an assessment of the feasibility of further reducing duplicative burdens on incorporated associations and charities across jurisdictions should be a high priority for future work. Stakeholder feedback has been positive so far, with charities operating in the ACT also pleased that reporting requirements have been reduced.³¹³

There is potential to lower some of the State and Territory based burden by providing direct access to the ACNC for information such as that contained in the Charity Passport.

Some stakeholders proposed changing all State and Territory laws to adopt the definition of a ‘charity’ from the Charities Act and/or define charities that are public benevolent institutions in line with the ACNC definition. Where they refer to this issue, submissions almost universally called for the harmonisation or standardisation of the regulatory and legislative framework that applies to charities. By their very nature, charities generally seek to limit their costs so that they can maximise the amount of money that goes to their core purpose. There is a cost of compliance that charities must pay and this can only be exacerbated for those charities operating across multiple jurisdictions which use different definitions of ‘charity’.

The AICD’s Blueprint for Growth Report Card measured progress on a number of reforms to improve the not-for-profits sector, saying that further commitment and action was needed in order to improve the rate of progress.³¹⁴

Our consideration of the issues

The Panel has specifically considered a national scheme in the context of registration, governance, fundraising and powers. These are the key areas for the sector where the absence of a national scheme is creating significant challenges, additional red tape and costs.

The Panel notes that some States and Territories have already begun taking steps to reduce the compliance burden on charities.

On 24 May 2016 the South Australian parliament passed the Statutes Amendment (Commonwealth Registered Entities) Act. It aims to remove duplication of reporting and licence requirements for charities registered with the national charity regulator, the Australian Charities and Not-for-Profit Commission (ACNC).

...

The new law is fairly simple in structure and purpose. It inserts a few clauses into the state Associations Incorporation Act to exempt entities registered with the ACNC from the reporting requirements under the Act. The bill also inserts similar clauses into the Collections for Charitable Purposes Act to exempt ACNC-registered organisations from fundraising licencing and reporting requirements.

...

The removing of duplicated reporting requirements under the state Associations Act and the Commonwealth ACNC Act minimises the impact of ACNC regulation on the charity sector, while the use

³¹¹ Submission, ACT Government, 28 February 2018.

³¹² Submission, ACT Government, 28 February 2018, page 3.

³¹³ Submission, ACT Government, 28 February 2018, page 3.

³¹⁴ AICD, Governance of the Nation: A report card on progress, 2018.

of ACNC registration to remove the need for an SA fundraising licence is exactly the sort of red tape reduction that the sector hoped for with the introduction of the ACNC.

SA charities can still be incorporated under the state Associations Act, but once registered with the ACNC the charities simply report to the Commonwealth.³¹⁵

Registration

A major issue in relation to red tape reduction is the interface between the ACNC and ASIC, as some registered entities continue to be regulated in certain regards by both agencies. The Panel considers that responsibility for the incorporation and all aspects of the regulation of these entities should rest with the ACNC, except for criminal offences.

Governance

As outlined in chapter 5, what has been clearly heard by the Panel is that the current system of different governance requirements is complex and confusing. It is unreasonable to expect that volunteer directors in the sector understand and comply with the multiple jurisdictional and sometimes inconsistent sets of governance requirements.

The community has a right to expect high standards of governance of charities. However, there is confusion as to the effect of the ACNC governance standards and their interaction with the Corporations Act and specific State and Territory laws. The Panel is of the opinion that it will be possible to develop, as a part of a national scheme, governance requirements that take into account the diverse nature of the sector, as well as having regard to the nuanced arrangements available under State and Territory law.

Fundraising

All jurisdictions in Australia, with the exception of the Northern Territory, currently have regulatory regimes impacting charities and not-for-profits.

As outlined in chapter 12, the regulatory regimes for fundraising across State and Territory jurisdictions are inconsistent, complex and inefficient. Fundraising reform provides a major opportunity in red tape reduction in Australia, particularly for charities and not-for-profits engaging in national fundraising or fundraising online. Significant time and resources is spent navigating the different regulatory requirements imposed in the different jurisdictions.³¹⁶

The Panel recognises that there are specific exemptions from the fundraising regulation for religious organisations, and some limited exemptions for other organisations, which means that there is not a level playing field. However, the Panel considers that the harmonisation of fundraising is a key issue that needs to be addressed in reducing red tape for charities and not-for-profits. The Panel concludes that ideally there should be a referral of powers to the Commonwealth to enable a national scheme for fundraising.

Powers

Chapter 3 discusses the powers to protect charitable assets generally (and other assets held by registered entities).

The long-term solution to comprehensively protect charitable and other assets is a national scheme.

³¹⁵ South Australian Council of Social Service, *Charities Reporting and Fundraising Red Tape Reduction – Factsheet*.

³¹⁶ Statement on Fundraising Reform, #fixfundraising, Justice Connect.

Conclusion

In the absence of a national scheme, charities and not-for-profits will continue to be subject to an unacceptable level of unnecessary red tape and the Panel considers that other efforts to reduce compliance will be merely interim steps.

There is a strong case for Commonwealth led reform of a complex regime in the charities and not-for-profit sector and the current web of regulatory red tape demands action. The benefits will be quickly realised, not just for charities and not-for-profits, but also for many disadvantaged and vulnerable Australians.

Recommendation 28

A single national scheme for charities and not-for-profits be developed.

PART D – ADDITIONAL AMENDMENTS

15. Legislative Amendments

Overview

The Panel received a number of submissions recommending various technical and other amendments. Many of the recommendations are sensible and do not require commentary. A number related to the interaction between the ACNC Act and the Corporations Act and require further investigation. One related to amending the ITAA 1997.

The ACNC Act and ACNC Regulations

A large number of amendments to the ACNC Act recommended seemed non-controversial to the Panel. Many originated from the ACNC. Some were made by accounting and audit specialists.

The recommendations supported by the Panel have been included at Appendix B and the Panel recommends that consideration be given to their adoption.

The interaction between the ACNC Act and the Corporations Act

One of the more vexed issues that was raised with the Panel related to the relationship between the ACNC Act and the Corporations Act. Elsewhere there have been recommendations on specific issues related to governance and registration.³¹⁷ The ‘turning on’ of director’s duties and other provisions previously ‘turned off’ may address some of the concerns. There have however, been a number of other matters raised that call for specific consideration. These include:

Legislation	Suggestion
Corporations Act	Consider amending the Corporations Act to provide clarity for registered entities as to the requirements for a special resolution.
Chapter 2E, Corporations Act	Consider the application of Chapter 2E (related party transactions) of the Corporations Act to registered entities.
Section 188, Corporations Act	Consider whether the requirement for a company secretary to ensure compliance with registered office requirements should not apply to registered entities.
Sections 327A and 327B Corporations Act	Consider amending to turn off the requirement to appoint an auditor in sections 327A and 327B for registered entities.
ACNC Act	Consider whether the Commissioner be given 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.
ACNC Act	Consider Including provisions similar to section 249B of the Corporations Act.
ACNC Act	Consider including provisions similar to section 251A of the Corporations Act.
ACNC Act	Consider including provisions similar to section 250PAA and 250PAB of the Corporations Act, given that registered entities are not required to hold annual general meetings.

³¹⁷ See chapters 5 and 13.

These matters have not been included at Appendix B and it is recommended that they be considered in conjunction with other recommendations dealing with matters related to the interface between the ACNC Act, ACNC Regulations and the Corporations Act.

Amendments to section 50-50 of the *Income Tax Assessment Act 1997*

The Panel received a recommendation from certain non-government members of the ATO Not-for-Profit Stewardship Group that the special conditions enacted, with effect from 1 July 2013, in the *Tax Laws Amendment 2013 (Measures No 2) Act 2013* (Cth) be repealed.

The ATO Stewardship Group – Non Government Members advised that its government members have reserved their position. However, they understand that the ATO considers the recommendations should be administratively workable. The Panel accepts this submission.

Deductible gift recipients (DGRs)

The Panel notes that the Government has announced the transfer of some DGRs not currently registered under the ACNC Act from the various current forms of registration to the ACNC Register. This integration provides an opportunity to clarify the definition and classes of DGRs.

PBIs that are religious charities

A number of submissions raised concerns about a recent Commissioner's Interpretation Statement that a PBI cannot be a religious charity at law. The issues involved are quite technical. The Panel has been unable to consider the issues fully in the time available so as to make precise recommendations but the issues should be addressed as soon as practicable.

The ACNC Acts and a further review

The regulatory provisions that apply to Australian charities and not-for-profits are contained in the ACNC Acts. Ideally all issues related to the ACNC should be consolidated into one Act.

In the course of this Review, the Panel has become increasingly aware of how dynamic and evolving the charities and not-for-profits sector is. The Panel recommends ongoing five year reviews.

Recommendation 29

Review the interface between the ACNC Act and the Corporations Act and consider the additional amendments set out in Appendix B.

Recommendation 30

The ACNC Acts be consolidated and there be ongoing five year reviews.

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APPENDIX A: TERMS OF REFERENCE

**Review of Australian Charities and
Not-for-profits Commission (ACNC)
legislation**

Terms of reference

20 December 2017

Terms of reference

This review will enable the Government to meet its statutory obligation that a review of the *Australian Charities and Not-for-profits Commission Act 2012* and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (together, the ACNC Acts) must be undertaken after their first five years of operation.

The Review Panel will inquire into and make recommendations on appropriate reforms to ensure that the regulatory environment established by the ACNC Acts continues to remain contemporary, that the ACNC Acts deliver on their policy objectives and that the ACNC Acts do not impair the work of the ACNC Commissioner to deliver against the objects of the principal Act; being:

- to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
- to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

The review should evaluate the suitability and effectiveness of the ACNC Acts. In particular, the review should:

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 review should be informed by public submissions, by international experience, through round table discussions and by consultation on substantive issues identified before recommendations are made to Government.

A report on the review's findings and recommendations will be required to be made to the Government by 31 May 2018. This report will be laid before each House of the Parliament within 15 sitting days of its receipt.

Some issues may be identified by the review panel that fall outside the scope of a statutory review of the ACNC legislation. The review panel should advise government of these matters and recommend whether further examination should be undertaken.

Public submissions

Public submissions are invited in response to the issues raised in the terms of reference by sending through written submissions using the details below.

Some focusing questions for submissions could be:

1. Are the objects of the ACNC Act still contemporary?
2. Are there gaps in the current regulatory framework that prevent the objects of the Act being met?
3. Should the regulatory framework be extended beyond just registered charities to cover other classes of not-for-profits?

4. What activities or behaviours by charities and not-for-profits have the greatest ability to erode public trust and confidence in the sector?
5. Is there sufficient transparency to inform the ACNC and the public more broadly that funds are being used for the purpose they are being given?
6. Have the risks of misconduct by charities and not-for-profits, or those that work with them, been appropriately addressed by the ACNC legislation and the establishment of the ACNC?
7. Are the powers of the ACNC Commissioner the right powers to address the risk of misconduct by charities and not-for-profits, or those that work with them, so as to maintain the public's trust and confidence? Is greater transparency required and would additional powers be appropriate?
8. Has the ACNC legislation been successful in reducing any duplicative reporting burden on charities? What opportunities exist to further reduce regulatory burden?
9. Has the ACNC legislation and efforts of the ACNC over the first five years struck the right balance between supporting charities to do the right thing and deterring or dealing with misconduct?

There will be further opportunities for stakeholders to contribute views on substantive issues that are identified by the Review Panel, including through roundtables and face-to-face consultation.

Closing date for submissions: 28 February 2018

Email	ACNCReview@treasury.gov.au
Mail	Mr Murray Crowe Individuals and Indirect Tax Division The Treasury Langton Crescent PARKES ACT 2600

APPENDIX B: ADDITIONAL AMENDMENTS

Legislation reference	Amendment
Australian Charities and Not-for-profits Commission Act 2012 (Cth)	
ACNC Act	<p>Provisions in the ACNC (C&T) Act that continue to apply be transferred to the ACNC Act so that there is only one piece of legislation governing the subject matter of the ACNC.</p> <p>If a full consolidation does not occur, that the ACNC Act to be amended to include a provision based on the transitional provision in Item 10 of Schedule 1 to the ACNC (C&T) Act, to give the Commissioner an ongoing discretion to treat reports made to other government agencies as being an AIS or an annual financial report.</p>
ACNC Act	<p>The ACNC give both a responsible person and the relevant registered entity:</p> <ol style="list-style-type: none"> a show cause notice before suspending or removing the responsible person; and a notice of the final decision.
ACNC Act	<p>Include a provision of the kind referred to in s 38(1)(b)(ii) of the <i>Freedom of Information Act 1982 (Cth)</i> (FOI Act) or specify Division 150 of the ACNC Act in Schedule 3 to the FOI Act).</p>
ACNC Act	<p>Include appropriate protections for whistleblowers.</p>
ACNC Act	<p>In the transfer of DGRs not currently registered under the ACNC Act to the Register, the definition and classes of DGR be clarified and anomalies be resolved.</p>
ACNC Act	<p>Consideration be given to amending the ACNC Act to make it clear that a registered entity that has religious or other purposes can be a PBI even though those purposes are more than incidental or ancillary.</p>
Section s25-5(5), ACNC Act	<p>Remove the subtype classifications in item 13 (health promotion charities) and 14 (public benevolent institutions) as these are not charitable purposes but rather exist for taxation purposes.</p> <p>Add new sub-sections to allow tax entities to register in one or more categories under the ACNC Act, and include health promotion charities or public benevolent institutions in these subsections.</p>
Section 35-10(1), ACNC Act	<p>Include as a ground upon which the Commissioner may revoke a registered entity's registration that the registered entity has ceased to operate.</p>
Section 40-5, ACNC Act	<p>The Register to include the grounds under s 35-10(1) on which a decision to revoke the registration of a registered entity is based, and a summary of the reasons for revocation.</p>
Section 40-10, ACNC Act	<p>Replace 'and' in paragraph (2)(a) of s40-10 with 'or'.</p>
Division 60 ACNC Act	<p>Include 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.</p>

Legislation reference	Amendment
Section 60-30(1) ACNC Act	An audit or review should be permitted to be undertaken by delegates of the Commonwealth, States and Territories' Auditors-General.
Sections 60-30(3)(d) and (4)(d) ACNC Act	Delete these sections or clarify the sections to make it clear that an assurance practitioner is not required to form an opinion over operational records. Alternatively, amend subsections 60-45(3)(b) and 60-50(3)(b) so that the auditor's report refers to 'any material deficiency, failure or shortcoming' and (ii) only applies in respect of the matters mentioned in paragraph 60-30(3)(b) or (c).
Section 60-40, ACNC Act	The requirement for auditors to provide registered entities with an independence declaration not apply to Commonwealth, State or Territory Auditors-General or their delegates.
Section 60-55 ACNC Act	Amend the section to align with the requirements of management within the auditing standards.
Section 115-55 ACNC Act	(i) The Commissioner be empowered to delegate any function or power to any member of the staff assisting the Commissioner. (ii) SES employees assisting the Commissioner be empowered 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. (iii) 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 150-30 ACNC Act	Replace 'under this Act' with 'in the performance of his or her duties as an ACNC officer'.
Section 150-50 ACNC Act	Remove the requirement that the disclosure be for the purposes of the ACNC Act.
Subdivision 150-C, ACNC Act	ACNC officers be expressly authorised 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.
Section 175-35 ACNC Act	Allow an administrative penalty to be imposed for the late submission of an annual financial report or additional report.

Legislation reference	Amendment
Section 195, ACNC Act	Consider whether the requirements of this section not apply to registered entities. That may involve considering amending or removing section 195-10(2).
Section 300-5, ACNC Act	Amend the definition of 'Australian government agency' to clarify whether it includes or excludes local government authorities. Alternatively, amend section 205-35(5)(a) of the ACNC Act to clarify whether grants from local government authorities are to be taken into account.
Australian Charities and Not-for-profit Commission Regulations 2013 (Cth)	
Regulation 40.10, ACNC Regulations	Redraft to provide more effective private ancillary fund privacy protection as discussed in chapter 8.
Regulation 45.25(3) ACNC Regulations	If a registered entity is a trust with more than one responsible person, then each responsible person must disclose any conflicts of that responsible person to all the other responsible persons unless a state imposed or other comparable governance standard apply.
ACNC Regulations	Consider prescribing for the purpose of section 60-3(1)(e) of the ACNC Act that an audit or review can be undertaken by a member of the Chartered Accountants Australian and New Zealand, Society of Certified Practising Accountants or Institute of Public Accountants.
Charities Act 2013 (Cth)	
Charities Act	Consider whether the definition of 'government entity' in the Charities Act should be repealed or, alternatively amended to be consistent with the definition of 'Australian government agency' in the ACNC Act or otherwise be amended to provide increased, certainty and internal consistency.
Income Tax Assessment Act 1997 (Cth)	
Section 50-50, ITAA 1997	Amendments introduced to the <i>Income Tax Assessment Act 1997</i> by Schedule 11 of Part 5 to the <i>Tax Laws Amendment (2013 Measures No. 2) Act 2013</i> be repealed.

APPENDIX C: CONSULTATIONS

Adams, Deborah	Compassion Australia
Alberti, Dr Susan AC	ACNC Advisory Board
Allan, Heather	ACNC Advisory Board
Allen, Kirsty	The Myer Foundation
Altman, Emeritus Professor Jon	ACNC Professional Users Group
Andrew, Michael AO	Board of Taxation, Black Economy Taskforce
Apostolova, Biljana	ACNC Professional Users Group
Argyle, Bruce	ACNC Sector Users Group
Aroney, Professor Nicholas	Religious Freedom Review
Ashe, Deirdre	ACNC Sector Users Group
Baird, Murray	Australian Charities and Not-for-profits Commission
Baird, Sari	ACNC Professional Users Group
Barraket, Professor Josephine	Centre for Social Impact
Bartlett, Jeffrey	ACNC Sector Users Group
Batrouney, Jennifer QC	ACNC Professional Users Group
Bennett, the Hon Dr Annabelle AO SC	Religious Freedom Review
Beric, Albert	Australian Taxation Office
Bouffler, John	Community Employers WA
Boyd-Caine, Dr Tessa	Health Justice Australia
Bravos, Cindy	ACNC Advisory Board
Brinkworth, Lindy	Relationships Australia (SA)
Brown, Graham	Baptist Care (SA)
Burns, John	Plan International
Butler, Phil	Australian Institute of Company Directors
Campbell, Robert	ACNC Professional Users Group

Casson, Jonathan	ACNC Professional Users Group
Cattell, Jamie	Charity Services (NZ)
Chambers, Kasy	Anglicare
Clode, Nadine	Justice Connect
Cohen, Simon	Director of Consumer Affairs Victoria
Coleman, Sophie	Save The Children Australia
Conder, Jane	Clontarf Foundation
Condon, Jocelyn	Australian Council for International Development
Connelly, Craig	The Ian Potter Foundation
Cooney, Louise	Charity Services (NZ)
Costello, Rev Tim AO	World Vision Australia
Crosbie, David	Community Council of Australia
Cross, Anne	UnitingCare
Croucher, Emeritus Professor Rosalind AM	Religious Freedom Review
Davies, Sarah	Philanthropy Australia
Debere, Nick	ACNC Sector Users Group
Devine, Wendy	Queensland Law Society
Dibble, Kenneth	Charity Commission for England and Wales
Dyce, Tim	Australian Taxation Office
Edgerley, Penelope	Charity Services (NZ)
Edwards, Julie	Jesuit Social Services
Edwards, Rob	Fundraising Institute Australia
Edwards, Terese	National Council of Single Mothers and their Children
Emerson, John AM	Herbert Smith Freehills
Falzon, Dr John	St Vincent de Paul Society

Fawcett, Andrew	Australian Securities and Investments Commission
Fay, Caitriona	ACNC Sector Users Group
Ferguson, Mark	Australian Taxation Office
Fitzgerald, John	Catholic Homes Incorporated
Fitzgerald, Robert AM	Former Chair of the ACNC Advisory Board
Fletcher, Julia	Charity Services (NZ)
Flynn, Patrick	Social Ventures Australia
Forrest, Nicola	Prime Minister's Community Business Partnership
Gamack, Bill	EPIC Assist
Gartmaan, Alexandra	Prime Minister's Community Business Partnership
Gibbs, Melinda	Australian Taxation Office
Gilchrist, Professor David	ACNC Advisory Board
Green, Simon	Ngala
Greenwood, Suzanne	ACNC Sector Users Group
Gregson, Scott	Australian Charities and Not-for-profits Commission
Hall, Stephen	Shelter WA
Harding, Professor Matthew	Melbourne Law School
Harding, Noel	ACNC Professional Users Group
Harris, Nigel	Mater Foundation
Heesh, Josephine	ACNC Professional Users Group
Hellings, Sarah	Minderoo Foundation
Hellman, Chris	Australian Criminal Intelligence Commission
Hills-Jones, Peter	ACNC Sector Users Group
Hillyard, David	Commissioner for Consumer Protection (WA)
Hogan, Peter	ACNC Advisory Board
Huang, Seak-King	ACNC Professional Users Group

Hudson, Angus	Department of the Prime Minister and Cabinet
Humphries, Reuben	Tanjenong Indigenous Corporation
Ianssen, Kai	Fundraising Institute Australia
Jenkinson, Samantha	People With Disabilities WA
Jobberns, Rev Keith	Australian Baptist Ministries
Johns, Dr Gary	Australian Charities and Not-for-profits Commission
Judd, Stephen	Hammond Care
Kandiah, Kala	ACNC Professional Users Group
Kean, the Hon Matthew, MP	Minister for Innovation and Better Regulation
Keenan, Tony	Hanover Welfare Services
Keet, Luke	Australian Securities and Investments Commission
Kerr, Stephen	CMA Standards Council
Kirkwood, Graeme	ACNC Professional Users Group
Klein, Libby	ACNC Professional Users Group
Lathelean, Elizabeth	ACNC Professional Users Group
Laverty, Dr Martin	ACNC Advisory Board
Lawton, James	Mercy Care
Leaversuch, Peter	The Royal Life Saving Society – Western Australia
Lefevre, Isabelle	ACNC Professional Users Group
Legena, Susanne	ACNC Sector Users Group
Leigh, the Hon Dr Andrew, MP	Australian Labor Party
Leonard, Allison	Anglicare WA
Leong, Elaine	ACNC Professional Users Group
Lind, Andrew	Queensland Law Society
Lipscombe, Penny	Consumer Protection (WA)
Little, Claerwen	UnitingCare

Locke, David	Australian Charities and Not-for-profits Commission
Lowe, Brendan	Compassion Australia
Lucas, Father Brian	ACNC Professional Users Group / Catholic Mission
Lucas, Steve	Anglican Church of Australia
Lui, Maria	ACNC Professional Users Group
MacDougall, Alice	Herbert Smith Freehills
Mahon, Kate	Youth Focus
Mallet, Linda	ACNC Advisory Board
Man, Maggie	Australian Accounting Standards Board
Marks, Andrew	ACNC Professional Users Group
Masuria, Reena	Centacare WA
Martin, Vin	Catholic Archdiocese of Melbourne
Maxwell, Catherine	ACNC Sector Users Group
Mayes, Lesleigh	ACNC Professional Users Group
McClellan, Scott	Fundraising Institute Australia
McConnell, Kym	ACNC Sector Users Group
McDiarmid, Dr Daniel	AskRIGHT
McDonald, Miriam	ACNC Professional Users Group
McGann, Colleen	Prime Minister's Community Business Partnership
McGrath, Sue	Councils on the Ageing
McGregor-Lowndes, Emeritus Professor Myles OAM	Queensland Law Society/Queensland University of Technology
McIntosh, John	Salvation Army
McIntosh, Tim	State Revenue Office (Victoria)
McKinnon, Elizabeth	ACNC Sector Users Group
Mein, Jim	Uniting Church

Mellas, Andrew	ACNC Sector Users Group
Mikelsons, John	Australian Council of Social Service
Miller, Simon	ACNC Sector Users Group
Monument, Prue	Australian Charities and Not-for-profits Commission
Moore, Francis	Catholic Archdiocese of Melbourne
Moss, Marian	Department of the Prime Minister and Cabinet
Murray, Associate Professor Ian	University of Western Australia
Nair, Prem	EPIC Assist
Neesham, Gerard	Clontarf Foundation
O'Brien, Greg	Cancer Council of Australia
O'Bryan, Norman SC	Victorian Bar
O'Donnell, Kevin	State Revenue Office (Victoria)
O'Dwyer, the Hon Kelly, MP	Liberal Party of Australia
Pararajasingham, Tamara	ACNC Sector Users Group
Pascoe, Susan AM	Australian Council for International Development
Passaris, Eric	ACNC Professional Users Group
Paterson, Jennifer	ACNC Professional Users Group
Paxton-Hall, Paul	Queensland Law Society
Peach, Kris	Australian Accounting Standards Board
Penny, Kristina	Australian Securities and Investments Commission
Perry, Angela	Prime Minister's Community Business Partnership
Phillips, Andrew	Charity Services (NZ)
Phillips, Miriam	Office of the Minister for Consumer Affairs, Gaming and Liquor Regulation
Picone, Adrienne	Volunteering Australia
Pigott, David	ACNC Advisory Board
Pinney, Ross	Australian Red Cross

Pope, Juanita	ACNC Sector Users Group
Price, John	Australian Securities and Investments Commission
Rajan, Suresh	Ethnic Communities Council WA
Ray, Lesley	Mater Foundation
Reid, Ashley	Cancer Council WA
Reid, Mary	Carers Australia
Reilly, Stephen	Charity Services (NZ)
Robinson, Anne AM	Prolegis Lawyers
Roff, Kate	Australian Taxation Office
Ruddock, the Hon Philip	Religious Freedom Review
Russell, Michelle	Charity Commission for England and Wales
Ryan, Lucas	Australian Institute of Company Directors
Sandeman, Peter	Anglicare SA
Sands, Alistair	AUSTRAC
Sayers, Mary	Victorian Council of Social Service
Scaife, Dr Wendy	Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology
Schultz, Sandra	Relationships Australia (SA)
Scott, Melanie	ACNC Professional Users Group
Scott, Peter	Prime Minister's Community Business Partnership
Seibert, Krystian	Philanthropy Australia
Shalders, Elizabeth	ACNC Professional Users Group
Shannon, Joe	ACNC Professional Users Group
Siewert, Senator Rachel	Australian Greens
Sin, Iris	ACNC Professional Users Group
Sivo, Ross	ACNC Sector Users Group

Soulio, Dini	Commissioner for Consumer and Business Services (SA)
Staer, Lance	ACNC Professional Users Group
Stead, Bishop Dr Michael	Anglican Church of Australia
Stilinovic, John	Seventh-day Adventist Church
Storey, Matthew	National Native Title Council
Stuart, Tony	ACNC Advisory Board, UNICEF Australia and the Prime Minister's Community Business Partnership
Sturrock, Rob	The Smith Family
Subramanian, Ram	CPA
Swindells, Darryl	ACNC Professional Users Group
Tanner, Mae	ACNC Professional Users Group
Teece, Mike	Universities Australia
Thethy, Raj	Youth Focus
Toomey, James	Mission Australia
Treseder, Peter AM	Prime Minister's Community Business Partnership
Turner, Pat	National Aboriginal Community Controlled Health Organisation
Twomey, Chris	WA Council of Social Service
Tziotis, Robert	ACNC Sector Users Group
Venables, Kate	Catholic Care
Visevic, Vera	ACNC Professional Users Group
Walker, Annabelle	Australian Securities and Investments Commission
Wallace, Dr Sue-Anne	ACNC Sector Users Group
Wallace, Trinidad	World Vision
Wallett, Barry	Independent Schools Council
Walsh, John AM	Magoo Actuarial Consulting
Ward, David	ACNC Sector Users Group

Watson, Heather	ACNC Advisory Board
Webb, Rose	NSW Fair Trading Commissioner
Webster, Dale	ACNC Advisory Board
Wheatley, Chris	Australian Red Cross
Wood, Katie	Amnesty International Australia
Woodward, Sue	Justice Connect
Wright, Robert	ACNC Professional Users Group
Wykes, Neil OAM	ACNC Sector Users Group
Yang, Jae	Anglican Church of Australia
Yassin, Laily	Consumer Protection (WA)
Yates, Joanne	St Vincent de Paul
Zabar, Joe	Catholic Social Services Australia

APPENDIX D: SUBMISSIONS

Adventist Development and Relief Agency Australia, Seventh-day Adventist Aged Care, Compassion Australia and Anglicare Sydney (joint submission)

AIDS Council of New South Wales

Alexander, Mike – Individual

Amnesty International Australia

Anglican Church Diocese of Sydney

Anglicare Australia

Association Executive Services

Association of Australian Medical Research Institutes

Australasian Council of Auditors-General

Australasian Society of Association Executives

Australia Major Performing Arts

Australian Accounting Standards Board

Australian Auditing and Assurance Standards Board

Australian Bahá'í Community

Australian Capital Territory Government

Australian Catholic Bishops Conference

Australian Catholic Churches

Australian Charities and Not-for-profit Commission

Australian Charities and Not-for-profit Commission Advisory Board

Australian Community Philanthropy

Australian Competition and Consumer Commission

Australian Conservation Foundation

Australian Council for International Development

Australian Council of Social Service

Australian Criminal Intelligence Commission

Australian Government Department of Education and Training

Australian Government Prime Minister's Community Business Partnership

Australian Institute of Company Directors

Australian Lawyers for Human Rights

Australian Not for Profit Accountants Network Inc.

Australian Red Cross

Australian Securities and Investments Commission

Australian Taxation Office

Australian Transaction Reports and Analysis Centre
Australian Zen Studies Institute
Baptist Care Australia
Baxter, Ken – Individual
BDO Australia
Beyond PMSA
Birrell, Ann – Individual
Burrows, Matt – Individual
Business Council of Co-operatives and Mutuals
Camp Quality
Cancer Council
Carers Australia
Caxton Legal Centre
CBM Australia
Chamber of Arts and Culture WA
Charitable Alliance (Individual Trustees)
Charity Law Association of Australia and New Zealand
Chartered Accountants Australia and New Zealand
Church, John – Individual
Cleard Life
CoHealth
Cole, Dr Michael – Individual
Community Council of Australia
Community Employers WA
Community Housing Industry Association
Community Mental Health Australia
Community Services Industry Alliance
Compassion Australia
Council for the National Interest
CPA Australia
Cripps Clark, Julianne – Individual
Dementia Australia (formerly known as Alzheimer’s Australia)
Department of Home Affairs
Edwards, Ron – Individual
Family Planning Australia
Farrell, Dr Kevin – Individual

Federation of Victorian Traditional Owner Corps
Filmer, Ewan – Individual
Flack, Dr Ted – Individual
Foundation of Alcohol Research and Education
Fowler, Mark – Individual
Fundraising Institute Australia
Gilchrist, Professor David – Individual
Global Development Group
Goorah, Ushi – Individual
Governance Institute of Australia
HammondCare
Hanrick Curran
Health Justice
HLB Mann Judd
Hsing Yun Education Foundation
Illawarra Legal Centre
Independent Schools Council of Australia
Independent Schools Queensland
Indigenous Remote Communications Association
Inner North Community Foundation
Institute of Public Accountants
Jackson, Ian - Individual
Jesuit Social Society
Johnston, Adam – Individual
Joint Submission – Council of Social Service Network
Justice Connect
Law Council of Australia
Law Institute of Victoria
Lock the Gate
Lord Mayor's Charitable Foundation
Meadowlands Church of the Nazarene
Mental Health Australia
Moores
Murray, Ian – Individual
Music Broadcasting Society of Victoria (3MBS)
National Association of Community Legal Centres

National Catholic Education Commission
National Disability Services
National Heart Foundation of Australia
National Native Title Council
Nehme, Dr Marina – Individual
Non-government members of the Australia Taxation Office Not-for-Profit Stewardship Group
O’Connell, Professor Ann – Individual
Opportunity Australia
Oxfam Australia
Peacock, Erin – Individual
Philanthropy Australia
Pitcher Partners
Plan International Australia
Positive Life
Prolegis Lawyers
Public Fundraising Regulatory Association
Public Health Association of Australia
Public Trustee of Queensland
Queensland Homicide Victim’s Support Group
Queensland Law Society
Racovolis, Daniel – Individual
Refugee Council of Australia
Reilly, Keith – Individual
Relationships Australia South Australia
Research Australia
Rose, Professor Greg – Individual
Royal Flying Doctor Service of Australia
RSPCA
Saward Dawson
Social Ventures Australia
Southern Tablelands Arts
St Vincent de Paul Society
Suicide Prevention Australia
Tamar 95.3 FM
Tanjenong Indigenous Corporation
The Benevolent Society

The Salvation Army
The Shepherd Centre
The Smith Family
The Tax Institute
The Wilderness Society
Theatre Network Australia
Uniting Church of Australia
Victorian Council of Social Service
Volunteering Australia
Walker, Roxanne – Individual
Walker, Victoria – Individual
Women Donors Network
World Vision Australia
WWF Australia