

2022–2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

[HOUSE OF REPRESENTATIVES/SENATE]

TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL
2023: ACNC REVIEW REC 17 – SECRECY PROVISIONS

EXPOSURE DRAFT EXPLANATORY MATERIALS

Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ACNC Act	<i>Australian Charities and Not-for-profits Commission Act 2012</i>
ACNC	Australian Charities and Not-for-profits Commission
Privacy Act	<i>Privacy Act 1988</i>

ACNC Review Rec 17 - Secrecy Provisions

Outline of chapter

- 1.1 Schedule [X] to the Bill amends the ACNC Act to allow for the disclosure of information about ongoing ACNC investigations, subject to a safeguard of a public harm test. The amendments allow the Commissioner to authorise an ACNC officer to disclose information about a recognised assessment activity in relation to a registered entity suspected of contravening a provision of the ACNC Act or not complying with a governance standard or external conduct standard.

Context of amendments

- 1.2 On 20 December 2017, the former Assistant Minister to the Treasurer announced a review of ACNC legislation to evaluate the performance of the legislative framework, the regulation of the Australian not-for-profit sector and to identify any improvements.
- 1.3 In 2018, the Review Panel (the panel) published its findings and recommendations in the *Strengthening for Purpose: The Australian Charities and Not-for-profits Commission Legislation Review report* (the report).
- 1.4 The panel identified that secrecy provisions in the ACNC Act prevent the Commissioner from publicly disclosing the Commission's regulatory activities (except to respond to or clarify issues already in the public domain). The panel found that expanding the Commissioner's power to disclose information would:
- increase public confidence that the regulator is actively pursuing misconduct, and
 - provide salutary guidance to other charities about poor behaviour.
- 1.5 The panel made the following recommendation (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.*
- 1.6 Schedule [X] implements Recommendation 17 in relation to ongoing investigations.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
The Commissioner may authorise an ACNC officer to disclose protected ACNC information where the disclosure would describe an ongoing or proposed investigation and would prevent or minimise the risk of significant harm, subject to a public harm test as a safeguard.	An ACNC officer cannot disclose information about an ongoing or proposed investigation where that information is protected ACNC information, unless that disclosure is in performance of duties under the Act, to an Australian government agency, or with consent, or the information has already been lawfully made available to the public.

Detailed explanation of new law

- 1.7 Schedule [X] to the Bill establishes a new exception for the disclosure of protected ACNC information relating to a recognised assessment activity. The exception permits an ACNC officer to publish information about a new or ongoing recognised assessment activity if the ACNC Commissioner (the Commissioner) has authorised the disclosure. However, any disclosure is subject to safeguards including a public harm test.
[Schedule [X], item 1, subsection 150-52(1) and paragraphs 150-52(3)-(4) of the ACNC Act]
- 1.8 If an ACNC officer is to make a disclosure under this exception, the information must be published on the ACNC website to allow the public to access the information easily.
[Schedule [X], item 1, paragraph 150-52(2)(a) of the ACNC Act]
- 1.9 The disclosure may also be made through any other medium, provided that disclosure in that medium is authorised in writing by the Commissioner.
[Schedule [X], item 1, paragraph 150-52(2)(b) of the ACNC Act]

Recognised Assessment Activity

- 1.10 Recognised assessment activity is defined in section 55-10 of the ACNC Act. It includes an activity carried out by the Commissioner involving the assessment of an entity's entitlement to registration as a type or subtype of entity, or compliance with the ACNC Act and regulations. It also includes an

activity carried out by the Commissioner of Taxation involving assessment of an entity's compliance with any taxation law.

The amendments provide for disclosure of recognised assessment activity by the Commissioner if the activity is being carried out, or proposed to be carried out, in relation to a suspected contravention of a provision of the ACNC Act or suspected non-compliance with a governance standard or an external conduct standard. The amendments do not allow for disclosures about recognised assessment activity being carried out by the Commissioner of Taxation.

[Schedule [X], item 1, paragraphs 150-52(3)(a) and (b) of the ACNC Act]

- 1.11 In this way, the disclosure exception is limited to ongoing (or proposed) investigations by the ACNC into a registered entity's conduct.

Authorisation by the Commissioner

- 1.12 The Commissioner may authorise an ACNC officer to disclose protected ACNC information about a new or ongoing recognised assessment activity if the Commissioner reasonably suspects that a registered entity contravened a provision of the ACNC Act or has not complied with a governance standard or an external conduct standard. The authorisation must be in writing.

[Schedule [X], item 1, paragraph 150-52(3)(a) of the ACNC Act]

- 1.13 An authorisation made under this provision does not constitute a legislative instrument. This is because item 4 of the table in section 6 of the *Legislation (Exemptions and Other Matters) Regulation 2015* provides that any instrument that authorises or approves a particular person to take a particular action or act in a particular way is not a legislative instrument.

[Schedule [X], item 1, paragraph 150-52(2)(b) and subsection 150-52(3) of the ACNC Act]

- 1.14 Any decision made by the Commissioner or an ACNC officer in relation to the disclosure of information about a new or ongoing recognised assessment activity about a registered entity's suspected contravention or non-compliance is not subject to merits review. This is appropriate given the decision relates to an ongoing or proposed investigation into an enforcement matter. Additionally, disclosures will only occur if necessary to avoid public harm, so any delay caused by a merits review process could lead to public harm.

[Schedule [X], item 1, paragraph 150-52(2)(b) and subsection 150-52(3) of the ACNC Act]

Public harm test

- 1.15 Before the Commissioner authorises the disclosure of protected ACNC information in relation to a recognised assessment activity, the Commissioner must compare the harm likely to be caused by the disclosure to the harm that

disclosure may prevent (the ‘public harm test’). This operates as a safeguard, ensuring that the disclosure does not cause disproportionate harm.

- 1.16 The Commissioner can only authorise a disclosure if satisfied that the disclosure is necessary to:
- prevent or minimise the risk of significant harm to public health, public safety or an individual; or
 - prevent or minimise the risk of significant mismanagement or misappropriation of funds or assets of the registered entity in question, or contributions to that registered entity; or
 - prevent or minimise the risk of significant harm to the public trust and confidence in the Australian not-for-profit sector, or to a part of the sector.

[Schedule [X], item 1, paragraph 150-52(3)(c) of the ACNC Act]

- 1.17 The term ‘contribution’ is defined under section 205-40 of the ACNC Act to include the provision by an individual of their time or reputation to an entity. The public harm test therefore involves consideration of the risk of mismanagement of volunteers’ time or reputation.
- 1.18 The risk of significant harm to the public trust and confidence in the Australian not-for-profit sector is not limited to the entire sector, but also includes any part of it. This allows the Commissioner to authorise disclosure where this would prevent or minimise the risk of significant harm to trust and confidence in part of the sector – for example, in particular types of charities – even where the impact on the wider not-for-profit sector may be less significant.
- [Schedule [X], item 1, subparagraph 150-52(3)(c)(iii) of the ACNC Act]***
- 1.19 If the information being considered for disclosure contains personal information, within the meaning of the Privacy Act, the Commissioner must be satisfied that the disclosure is necessary to achieve the objects of the ACNC Act before deciding to make a disclosure.
- [Schedule [X], item 1, paragraph 150-52(3)(d) of the ACNC Act]***
- 1.20 Even if the Commissioner determines that the disclosure of the information is necessary to prevent or minimise the risk of significant harm or significant mismanagement or misappropriation under paragraph 150-52(3)(c), the Commissioner can only authorise the disclosure of information if any harm that is likely to be caused to the registered entity (mentioned in paragraph (3)(a)) through the disclosure is not disproportionate.
- [Schedule [X], item 1, subsection 150-52(4) of the ACNC Act]***
- 1.21 The Commissioner must also be satisfied that disclosure would not cause disproportionate harm to an individual who is:
- employed by the registered entity under a contract of service; or
 - engaged by the registered entity under a contract for services; or

- being provided with services, or receiving benefits, under a program provided by the registered entity; or
- a volunteer of the registered entity; or
- a member of the registered entity; or
- otherwise connected to the registered entity.

[Schedule [X], item 1, paragraphs 150-52(4)(a)-(f) of the ACNC Act]

1.22 In determining whether the harm likely to be caused to the registered entity or to an individual listed in paragraphs 150-52(4)(a)-(f) is disproportionate, the Commissioner must have regard to:

- the risk and significance of harm (or mismanagement or misappropriation) under paragraph 150-52(3)(c); and
- the seriousness of the suspected contravention or non-compliance; and
- the strength of the evidence available to the Commissioner; and
- whether the suspected contravention or non-compliance is likely to be the result of an act or omission of the registered entity, or of an individual who has acted without the authority of the registered entity.

[Schedule [X], item 1, paragraphs 150-52(4)(g)-(i) of the ACNC Act]

1.23 Consideration of these factors may involve weighing them against each other. For example, if only limited evidence is available to the Commissioner, that may be a factor against disclosure. However, if the suspected contravention or non-compliance is very severe, the Commissioner may consider that the harm likely to be caused to the registered entity or an individual is not disproportionate to the public harm that disclosure would avoid, and therefore authorise disclosure even where there is limited evidence.

Notifying an entity before publication

1.24 The Commissioner may give written notice to an entity advising them that the Commissioner is considering giving an authorisation to publicly disclose information that concerns that entity. The entity the Commissioner may give notice to is not limited to the registered entity mentioned in paragraph (3)(a), but can include any other entity that may be affected by the disclosure. Any such notice does not constitute a legislative instrument, as table item 18 in section 6 of the *Legislation (Exemptions and Other Matters) Regulation 2015* provides that a notice of a proposed decision is not a legislative instrument.

[Schedule [X], item 1, subsection 150-52(5) of the ACNC Act]

1.25 An entity that receives notice from the Commissioner of a potential authorisation may provide a response to the Commissioner if they wish. The Commissioner may publish on the ACNC website a copy of an entity's

response or any information included in the response as long as the entity has not requested the response (or information in it) be kept confidential.

[Schedule [X], item 1, subsection 150-52(6) of the ACNC Act]

- 1.26 However, the Commissioner is not obliged to provide notice to any entity, nor publish an entity's response (or information in it) before they decide to authorise the disclosure of the information.

[Schedule [X], item 1, subsections 150-52(4) and (7) of the ACNC Act]

Use of offence-specific defences

- 1.27 Section 150-25 of the ACNC Act makes it an offence for an ACNC officer to use or disclose protected ACNC information. The ACNC Act contains a number of exceptions that allow for the disclosure of protected ACNC information in limited circumstances.
- 1.28 The exception inserted into the ACNC Act by Schedule [X] therefore reverses the evidential burden of proof. The Guide to Framing Commonwealth Offences states that the use of offence-specific offences will be appropriate in circumstances where the matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove the matter.
- 1.29 A disclosure can only be made where authorised by the Commissioner, and the Commissioner may only authorise disclosure of information relating to ongoing or proposed recognised assessment activity. Whether the Commissioner has authorised disclosure, and whether the ACNC is currently or proposing to conduct recognised assessment activity into a registered entity, is peculiarly within the knowledge of ACNC officers. It may also be more difficult and costly for the prosecution to prove the matter. Therefore, it is appropriate to reverse the evidential burden of proof in this instance.

Commencement, application, and transitional provisions

- 1.30 Schedule [X] to the Bill commences the day after Royal Assent.
- 1.31 The amendments apply in relation to recognised assessment activity carried out by the Commissioner on or after commencement relating to conduct of a registered entity before, on or after commencement. This ensures that the ACNC may disclose information about investigations which are ongoing at the time of commencement.
- [Schedule [X], item 2]***