Australian Charities and Not-for-profits Commission Bill 2012

Matthew Thomas, Social Policy Section
Paula Pyburne, Law and Bills Digest Section

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Australian Charities and Not-for-profits Commission Bill 2012

Date introduced: 23 August 2012

House: House of Representatives

Portfolio: Treasury

Commencement: Sections 5–5 and 5–10 on Royal Assent; all other provisions on the later of 1 October 2012 and the day the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 receives Royal Assent.¹

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Australian Charities and Not-for-profits Commission Bill 2012 (the Bill) is to establish a national regulator of, and a national regulatory framework for, the not-for-profit sector.

This Bill is one of three in a suite of Bills which are being considered together. The other Bills are:

- the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012² and
- the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012.³

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¹ It should be noted that sections 5–15 to 300–5 will not commence at all if the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 does not receive Royal Assent.


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Background

What is a not-for-profit organisation or charity?

A range of different terms is used to describe organisations in Australia that are separate from government, do not distribute profits and seek to provide a range of public goods and services to, or on behalf of, members and groups of interest. A number of highly disparate organisations meet these criteria and various commentators have noted the resultant problems in defining the sector as a whole.  

The terms most frequently used in Australia to describe the sector include non-profit, not-for-profit, charity, non-government organisations (NGOs), voluntary associations, independent, third-sector and civil society. These terms are either used interchangeably, or to describe particular aspects of the organisations that make up the sector. In the case of the term not-for-profit (NFP), this term is used to emphasise the point that such organisations are not formed for the purposes of personal financial enrichment. As such, NFP organisations are ‘typically constrained from distributing any profits made by the organisation to its members’. As a rule, these organisations operate democratically, in that, under their constitutions, members have the right to vote for a management committee, or board of directors, and on other organisational matters.

Charities are a form of NFP organisation. The key difference between a charity and other forms of NFP organisation is that a charity has been endorsed by the Australian Taxation Office (ATO) as having charitable status and thus as qualifying for charity tax concessions. This is not to say that other forms of NFP organisation are not able to gain exemption from taxes and other tax

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concessions. Organisations may either be endorsed as income tax exempt funds or qualify for various tax exemptions or concessions (see below).  

Australia’s NFP sector

Australia’s NFP sector is very large, being made up of around 600,000 organisations. Of these, some 59,000 are economically significant—that is, they employ staff or access tax concessions. As at 2006–07, these economically significant NFP organisations employed 889,000 staff (around eight per cent of total employment) and contributed approximately $43 billion to the nation’s gross domestic product.  

The remaining majority of NFPs (around 440,000) are small unincorporated organisations—that is, they are not a separate legal entity apart from their members. As such, these organisations ‘do not have reporting obligations, Australian Business Numbers (ABNs) and cannot be endorsed as charities or Deductible Gift Recipients (DGRs)’. They are, however, able to self-assess income tax exemptions. Should the current Bills be passed then all NFP organisations that receive government concessions and benefits will gradually be required to be registered with the Australian Charities and Not-for-profits Commission (ACNC). While at this stage NFP organisations that do not claim public monies will not be required to be registered with the ACNC, the Explanatory Memorandum notes that the Bill ‘establishes a regulatory framework that can be extended to all NFP entities in the future’.  

As this brief outline suggests, the NFP sector is very diverse. Generally speaking it is made up of organisations that are formed to further social, environmental or cultural objectives. This includes charities, charitable trusts, churches and religious groups, sporting organisations and clubs, advocacy groups, community organisations, cooperatives, trade unions, trade and professional associations, chambers of commerce, welfare organisations and service providers.

The NFP sector’s contribution to national life extends beyond immediate economic returns to include helping to shore up its general wellbeing. It is in recognition of this contribution and the key role played by the sector in providing services and meeting community needs that governments

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12. An organisation or fund that is not operated for profit or for the individual gain of its members is not automatically exempt from paying Commonwealth income tax. To gain exemption, an organisation must meet the requirements for one of the exempt entities that are listed in the *Income Tax Administration Act 1997*.


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provide funding to the sector—both directly for the delivery of programs and services and indirectly through tax exemptions and concessions. In 2006–07 it is estimated that direct government funding of $25.5 billion was provided to the sector.\textsuperscript{14} The general public also provides support for the sector, both through donations and by volunteering their time. In 2006–07 over 4.6 million Australians volunteered with NFP organisations (at a wage equivalent value of around $14.6 billion)\textsuperscript{15}, and total public donations to the sector were around $7.2 billion.\textsuperscript{16}

**Current NFP regulation**

Currently, regulation of the NFP sector at the Commonwealth level falls largely to the Australian Taxation Office (ATO). As noted above, the ATO is responsible for determining charitable status. It also determines whether or not NFP organisations are eligible for tax exemptions and concessions such as fringe benefits tax (FBT), deductible gift recipient (DGR) status, refundable franking credits and goods and services tax (GST) concessions. The Australian Securities and Investments Commission (ASIC) is responsible for regulating those NFP organisations that are companies limited by guarantee.

Many NFP organisations (incorporated associations and charitable trusts) may also receive state-based tax concessions or be exempt from some state-based taxes (such as stamp duty, payroll and land tax), for which they need to be registered as a NFP entity with the relevant state or territory government. These state-based tax exemptions and concessions vary by jurisdiction and by an organisation’s legal form, as do fundraising procedures and regulation.

Depending on the legal form taken, and the types of activity in which they engage, NFP organisations may be subject to a number of different reporting requirements, imposed at both Commonwealth and state and territory level. The main forms of reporting requirements are:

- corporate and financial reporting associated with the legal structure under which NFPs are incorporated
- fundraising-related reporting
- information required for concessional tax treatment and

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\textsuperscript{15} Productivity Commission, op. cit., xxvi.

• financial, governance and performance information for gaining and acquiring Commonwealth and state and territory government funding (such as grants and contracts). 17

Larger NFP organisations may thus have to report to a number of different agencies both within and across jurisdictions—in many cases providing identical information. This is, of course, both costly and time-consuming. The situation is further complicated for these organisations by the fact that there is no single set of accounting standards or agreed-upon standard for reporting that applies to NFP organisations. This means that where NFP organisations do report on their use of donations and public monies, this information need not necessarily be clear or comparable.

Many of the existing regulatory and reporting requirements demanded of NFP organisations have been designed with for-profit organisations in mind. As a consequence, they are neither suitable nor appropriate. In addition, while some NFP organisations must meet a burdensome array of governance and reporting requirements, others, as noted above, have relatively few reporting and accountability requirements. Partly as a result of this regulatory incoherence and varying public disclosure requirements, the public has little information on the activities of NFP organisations.

The upshot of the above is that NFP regulation in Australia is in what might colloquially be called ‘a mess’, and this has some significant consequences:

• the variation in legislation and reporting requirements adds complexity and cost for NFP organisations, especially where they operate in more than one jurisdiction. 18 This is particularly so for national NFP organisations that seek to run single national fundraising campaigns
• the complexity of legislation and regulations for many NFP organisations means that they are obliged to spend time on meeting administration and compliance requirements rather than on fulfilling their purpose
• arguably, there is a conflict of interest associated with the ATO being responsible for revenue raising while at the same time making decisions on whether or not NFP organisations should be granted charitable status 19

17. Productivity Commission, op. cit., p. 129.
19. The 2001 inquiry into the Definition of Charities and Related Organisations considered the question of whether or not it was appropriate for a revenue agency (the ATO) to act as the primary decision maker on charitable status. The main argument against this arrangement (at both Commonwealth and state levels) was that it ‘can result in a conflict of interest, in that the agencies’ concern for their primary responsibility (to protect the revenue) would tend to outweigh their interest in granting an organisation charitable status, and therefore eligibility for taxation concessions.’ The Treasury, Report of the inquiry into the Definition of Charities and Related Organisations, Commonwealth of Australia, Canberra, June 2001, pp. 280–281, viewed 17 September 2012, http://www.cdi.gov.au/html/report.htm. A majority of submissions to the Inquiry were of the view that it was inappropriate for the ATO to be responsible for the determination of charitable status. It was strongly felt that decision making on definitions as to whether or not organisations were charitable (and should receive tax exempt status, as such) should be the preserve of an independent body. Indeed, the ATO itself shared this view. There was divergence of opinion when it came to the question of whether the independent authority should be separate from the ATO (a National Charities Commission) or established as a specialised unit within the ATO, with supervisory...
because of the confused nature of the taxation laws that apply to NFP organisations, the ATO has little idea of what the sector is worth or how much tax is forgone each year. Given the size of the sector and the current political emphasis on fiscal rectitude, this is an issue of that is likely to be of some concern to the body politic

relatedly, the lack of consistent regulation and reporting requirements makes it difficult to measure the efficiency and effectiveness of the sector

the relative inconsistency in accountability requirements across the NFP and for-profit sectors poses issues in terms of competitive neutrality, given that NFP organisations are frequently in competition with for-profit organisations in the provision of goods and services and

the absence of uniform accounting and reporting standards results in a lack of transparency and accountability. Where transparency and accountability are lacking (or are seen to be lacking), this can not only foster inefficiency in the use of funds, but can also reduce public trust and confidence and willingness to donate either time or money.

A national NFP regulator

It has been generally agreed for some time that regulation of the NFP sector is in need of major reform. There is also a broad consensus that there is a need to move from the current system in responsibility for the body assigned to the ATO. Ultimately, the Inquiry Committee concluded that ‘as a matter of principle ... the charitable status of an entity should stand independently of the taxation concessions that may attach to that status’. Ibid. As a result, it recommended the establishment of an independent body to be responsible for determining the charitable status of entities.


21. This is a point that has been emphasised by both the Productivity Commission and the Henry Review into Australia’s Future Tax System. The Henry Review found that while income tax and GST concessions for NFP organisations do not violate the principle of competitive neutrality, fringe benefits tax (FBT) concessions do. It recommended that these concessions be phased out over ten years, and replaced with direct government funding to assist NFP organisations with the costs of recruiting specialist staff. See Australia’s Future Tax System Review, Australia’s future tax system: report to the Treasurer: part two—detailed analysis, Commonwealth of Australia, Canberra, 2010, p. 205–13, viewed 17 September 2012, http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm

While many commentators isolate the competitive advantage enjoyed by those NFP organisations in competition with for-profit organisations in the provision of goods and services, they typically do not acknowledge the possible disadvantages experienced by NFP businesses. Although many NFP community service organisations are increasingly operating like private businesses, they are nevertheless committed to the welfare of their clients and to providing the best services they can. As ethical organisations, they consider they should continue to provide services to their often disadvantaged clients, regardless of whether or not they are in a financial position to do so, or to realise a profit in the process. Business organisations frequently do not operate according to such ethical principles. That said, in instances where NFP organisations are running businesses and making large profits, there is clearly a case for greater regulation for competitive neutrality.

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which NFP organisations are regulated in an ad-hoc manner by a variety of regulators to a single, coherent, independent national regulatory system.

In recent years a number of reviews have been conducted into the regulation and taxation of Australia’s NFP sector. As highlighted below, each of these reviews has recommended the establishment of a single, independent national commission for NFP organisations. They have also recommended that NFP regulatory and taxation arrangements should be simplified and harmonised. This, it is argued, could both improve the operation and performance of the sector and increase its transparency and accountability.

• in 2001, the inquiry into the Definition of Charities and Related Organisations recommended that ‘the Government consider establishing a comprehensive national administrative framework for the charitable and related sector’. It also recommended that the ‘Government seek the agreement of all state and territory governments to establish an independent administrative body for charities and related entities, and to the legislative changes necessary for its establishment’.

• in 2008 the Senate Economics Committee conducted an inquiry into the disclosure regimes for charities and not-for-profit organisations. Among other things, the committee recommended that ‘there be a single independent national regulator for Not-For-Profit Organisations’.

• in 2010 the Review into Australia’s Future Tax System (Henry Review) considered issues relating to tax concessions and regulatory arrangements for the NFP sector. It recommended that ‘a national charities commission should be established to monitor, regulate and provide advice to

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22. During the past decade or so a number of countries similar to Australia have increasingly focused their policy attention on the NFP sector and its regulation. Under the Blair Labour Government the UK in particular undertook wide-ranging reforms to support England and Wales’ NFP sectors. These reforms included the establishment of a Charity Commission. The Australian Government has followed closely the Blair Government’s policy approach to the NFP sector and the proposed ACNC is reasonably similar in its structure and functions to the UK Charity Commission. Until recently, the New Zealand Charities Commission (NZ Charities Commission)—Komihana Kaupapa Atawhai—performed a similar role to its England and Wales equivalent. The NZ Charities Commission, which was established in 2005 under the Charities Act 2005 (NZ), was responsible for ‘registering and monitoring charitable organisations in New Zealand, as well as providing support and education to the charitable sector on good governance and management’. The Commission’s register of charities is made available on its website, enabling organisations to apply online for registration and the public to search for charities’ details. On 11 August 2011, NZ State Services Minister, Tony Ryall announced that as a part of a general rationalisation of the number of government agencies, the functions of the NZ Charities Commission would be transferred to the Department of Internal Affairs. The disestablishment of the NZ Charities Commission is anticipated to result in direct savings to that government of $2.032 million over the four years from 2012–13. ProBono Australia News, ‘New Zealand shuts down its Charities Commission’, 1 March 2012, viewed 17 September 2012, http://www.probonoaustralia.com.au/news/2012/03/new-zealand-shuts-down-its-charities-commission#


25. Ibid., p. 45.

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all not-for-profit (NFP) organisations (including private ancillary funds). The charities commission should be tasked with streamlining the NFP tax concessions (including the application process for gift deductibility), and modernising and codifying the definition of a charity.  

- in 2010 the Productivity Commission recommended the establishment of a national ‘one-stop-shop’ for Commonwealth regulation and tax endorsement of the NFP sector. As the Productivity Commission saw it, the regulator should be responsible for registering and endorsing organisations for tax concessions, establishing a single portal for information, providing guidance to the sector and investigating compliance with regulatory requirements and complaints.  

- in 2010, the Senate Economics Legislation Committee reported on its inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010. The Committee argued that the best way to increase transparency and accountability in the NFP sector would be to establish a single, independent national commission for NFP organisations.

### Basis of policy commitment

The timing and motivation for progressing the proposed Australian Charities and Not-for-profits Commission (ACNC) would appear to have its origins in the Rudd-Gillard Government’s commitment to improve relations with the NFP sector.

### Government–NFP sector relations

Generally speaking, for a number of years Australian government policy towards the NFP sector has been piecemeal, and, in many respects, exploitative. This is largely a result of the sector’s having been almost invisible to and little understood by governments. It is also due to the absence of a national and whole-of-government perspective on the sector.

Mark Lyons, former Professor of Social Economy at the University of Technology, Sydney, was arguably the most widely renowned expert in the field of NFP sector research in Australia. In his account, not only have successive governments failed to understand the nature of the NFP sector, but they have also failed to appreciate the extent and character of the sector’s contribution to Australian society. Because governments do not have a comprehensive understanding of the sector, Lyons contends, their policies towards it are ‘primarily shaped by their experiences of funding

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27. Productivity Commission, op. cit.
29. See for example K Rudd (Prime Minister) and U Stephens (Parliamentary Secretary for Social Inclusion and the Voluntary Sector), Australian Government and not-for-profit sector sign up to national compact, media release, 17 March 2010, viewed 17 September 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FXP6W6%22

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relationships’. 31 This has resulted in the field of community services—those NFP organisations that deliver services to disadvantaged people—being the most troubled part of the NFP sector where it comes to government-sector relations. 32

The last decade or so in Australia has been characterised by increasing use of purchase of service contracting and competitive tendering funding arrangements for NFP organisations involved in service delivery. Arguably, this represents the most significant change in the history of government relations with the NFP sector.

Where many NFP organisations were previously funded on the basis of government grants (they were provided with ‘core’ funding, partly in recognition of their representative role in providing informed advice to the government), funding arrangements have been shifted to a contractual basis, with governments purchasing from NFP organisations that provide community services specific units of service. The provision of particular forms of services was also opened to competitive tender. 33

According to some commentators, with these changes, NFP organisations came to be treated by governments as primarily service providers, with little appreciation of the social and political contribution that they can, and do, make. Some critics have argued that the Howard Government’s moves through the use of contracts to prevent or reduce public-serving NFP organisations from advocating on behalf of those groups to whom they provide services was a further reflection of this limited understanding of the role of the sector. 34 Under these moves, confidentiality clauses (otherwise referred to as ‘gag’ clauses) were included in purchaser-provider contracts that carried with them requirements that the organisation could not speak to the media without first obtaining the approval of the relevant department or minister. 35

31. Ibid.
32. Ibid., p. 9.
33. The changes made were in response to a range of factors including the introduction of National Competition Policy, a preference for market models, a preference for smaller government with a redefinition of its core business, a desire to change the mix of service providers and to open the newly-created markets to new players, shifting influences in the social policy process, a refocusing of the system towards client and community needs, managing for outcomes and a new emphasis on capacity-building for communities. M Raper, ‘Examining the future of the welfare state and the need for innovative approaches to service delivery’, ACOSS Info 211, June 2000, viewed 17 September 2012, http://parlinfo/parlinfo/download/library/jrnart/XAU16/upload_binary/xau169.pdf;fileType=application/pdf#search=%22Examing%20the%20future%20of%20the%20welfare%20state%20and%20the%20need%20for%20innovative%20approaches%20to%20service%20delivery%22. It is important to note, as does Raper, that not all of the changes introduced had a negative impact on individuals, families, communities and the community services sector. Some contributed to more effective and supportive communities, and helped to improve the quality of life of the most disadvantaged people and regions.
35. Ibid.

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In Lyons’ view, the policy changes introduced over the last decade (and earlier) have been made ‘with little knowledge and less concern about their effects on the third sector’. Rather than see themselves as collaborators with the community services sector, ‘governments have come to see themselves as playing the lead role, as purchasers of service from private providers’. In doing so, governments have refused to acknowledge that there is any meaningful difference between NFPs and for-profits.

Lyons goes on to argue that if fruitful relations are to be developed between government and the sector, this requires a recognition by the whole of government of the social and political as well as the economic contribution made by the sector, and the development of a coherent, whole-of-government policy and regulatory framework based on that recognition.

The Rudd-Gillard Government and the NFP sector

As a part of its social inclusion agenda, the Rudd-Gillard Government committed to the development of a new, more collaborative and productive relationship with the NFP sector. This relationship was to see an increased role for the sector, both in providing social services and in facilitating greater social participation. As a means to the development of this relationship, the Government, among other things:

- appointed a Parliamentary Secretary for Social Inclusion and the Voluntary Sector

37. M Lyons, ‘Improving Government – Community Sector Relations’, op. cit., p. 10. See also M Rawsthorne, ‘Community development activities in the context of contracting’, *Australian Journal of Social Issues*, 40: 2, Winter 2005, p. 234, viewed 17 September 2012, http://parlinfo/parlInfo/download/library/jrnart/97NG6/upload_binary/97ng63.pdf;fileType=application/pdf#search =%22Community%20development%20activities%20in%20the%20context%20of%20contracting%22. It has been argued by some critics of service agreements that ‘the policy language of partnership and collaboration is inconsistent with legally binding service agreements that use restrictive evaluation and performance measurement processes to control service delivery.’ K Brown and N Ryan, ‘Redefining Government – Community Relations Through Service Agreements’, *The Journal of Contemporary Issues in Business and Government*, 9: 1, 2003, p. 22, viewed 17 September 2012, http://parlinfo/parlInfo/download/library/jrnart/GYE96/upload_binary/gye964.pdf;fileType=application/pdf#search= %22Redefining%20Government%20Community%20Relations%20Through%20Service%20Agreements%22. This type of argument has it that the community services sector has to be treated as operating under a different operating logic from that of profit-driven business or electorally-driven government. Instead, the sector is driven to a greater or lesser degree by the virtues of altruism and mutuality, virtues that are typically not recognised and accounted for in service agreements.

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• removed ‘gag’ clauses in government contracts with the sector which threatened to cut off government funding and grants where organisations were openly critical in the media of government policy\textsuperscript{39}
• commissioned the Productivity Commission to develop a tool to measure the direct and indirect contributions of the sector to the economy and identify impediments to the sector’s development and
• negotiated a National Compact with the NFP sector. This compact defines ‘the rules of engagement’ and provides a basis for improving the policy, programs and services for Australia’s communities.\textsuperscript{40} It does so by outlining a shared vision, principles, aspirations and priorities for action.

As mentioned above, the Productivity Commission’s final report on the contribution of the NFP sector was published in January 2010. One of its key recommendations was that ‘the Australian Government should establish a one-stop-shop for Commonwealth regulation by consolidating various regulatory functions into a new national Registrar for Community and Charitable Purpose Organisations’.\textsuperscript{41}

In its response to the Productivity Commission report, and in the context of the 2010 Federal Election, the Government committed, if re-elected, to:

• establish a new office for the NFP sector, located within the Department of Prime Minister and Cabinet
• commence a scoping study to determine the role and design options for a national ‘one-stop-shop’ regulator for the NFP sector to remove the complex regulatory arrangements currently in place and streamline reporting arrangements
• harmonise and simplify federal, state and territory Government regulation of the sector and
• reduce red-tape for government-funded NFP organisations by developing a common form contract or ‘master agreement’ and reviewing tendering, contracting and acquittal arrangements between the Australian Government and NFP organisations to streamline and reduce burden commensurate with risk.

\textsuperscript{39} It is not just the Government that determined that charitable organisations should be free to engage in advocacy and lobbying activities, but also the High Court. On 1 December 2010 the High Court overturned a Federal Court decision in favour of the Australian Taxation Office’s disqualification of Aid/Watch as a charitable organisation on the grounds that Aid/Watch was engaged in political activity. For the judgment summary see High Court of Australia, \textit{Aid/Watch Incorporated v Commissioner of Taxation} [2010] HCA 42, 1 December 2010, viewed 17 September, 2012, \url{http://www.hcourt.gov.au/assets/publications/judgment-summaries/2010/hca42-2010-12-01.pdf}
\textsuperscript{40} Australian Government, \textit{National compact: working together}, Canberra, 2010, viewed 17 September 2012, \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F0PLX6%22}
\textsuperscript{41} Productivity Commission, op. cit., p. 152.

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The Government also committed to working towards greater harmonisation between the Australian and state and territory governments on NFP sector issues, including regulation.42

As a part of the 2011–12 Budget, the Government allocated $53.6 million over four years for the establishment of the Australian Charities and Not-for-Profits Commission (ACNC).43

On 21 January 2011 the Government released a public consultation paper as a part of its scoping study for an NFP regulator.44 Treasury received 162 formal submissions and the Final Report was released on 4 July 2011.45

On 9 December 2011, the Government released on the Treasury website for public consultation an exposure draft of the Bill and a discussion paper to elicit feedback on the proposed regulatory and reporting framework.46 Submissions on the exposure draft closed on 20 January 2012 and submissions on the discussion paper closed on 27 February 2012. Treasury received 108 submissions in response to the exposure draft.47

It was originally intended that the ACNC would commence operations by July 2012. However, following consultation with the sector, the Government decided to delay the start date for the ACNC to 1 October 2012.48 This was to ensure that maximum feedback could be gained from the sector and the legislation ‘gotten right’.49

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49. There are two other key reforms to the not-for-profit sector currently under way. The first of these is the development of a new, uniform definition of ‘charity’ that is to be applied Australia-wide from 1 July 2013. (Currently there is no statutory definition of ‘charity’, only a common law definition which changes in line with court decisions.)
Structure, function and operations of the ACNC

The ACNC would be an independent statutory agency, structurally separate from the ATO. It would be comprised of a Commissioner, an Advisory Board and officers to be engaged under the Public Service Act 1999. The ACNC would report to Parliament on an annual basis through the Treasurer.

The Bill proposes that from 1 October 2012 the ACNC would be responsible for registering new charities, with existing charities automatically registered. Over time, all NFP organisations that receive government concessions and benefits would be registered.

The new governance standards and financial reporting requirements introduced under ACNC regulation would not be applied until 1 July 2013. Annual information statements for small NFP organisations would be in respect of the 2012–13 financial year and need to be lodged by 31 December 2013. The first financial reports for medium and large NFP organisations would fall due after 1 July 2014.\(^5\)

The main responsibilities of the Commissioner would be to:

- register NFPs that meet the entitlement criteria (specified at Division 25) and thus qualify for access to certain Commonwealth tax concessions
- revoke the registration of NFPs where necessary conditions are not met, after having given written notice and the opportunity for NFPs to contest the revocation
- publish and maintain a register containing details of each qualifying NFP organisation, including financial, audit or review reports and

On 28 October 2011, the Government released a Consultation Paper on the definition of charity on the Treasury website. Treasury, *Consultation paper – a definition of charity*, 28 October 2011, viewed 17 September 2012, http://archive.treasury.gov.au/contentitem.asp?ContentID=2161. The second key reform is a change to not-for-profit income tax concessions. The change is to ensure that these concessions only apply to those activities that directly further a not-for-profit organisation’s altruistic purpose. The new arrangements were to have commenced on 1 July 2011, affecting only new unrelated commercial activities commencing after 10 May 2011. However, following consultation with the sector, the Government announced an extension of the start date of this measure to 1 July 2012. At the same time, the Government has established the Not-for-Profit Sector Tax Concession Working Group (on 12 February 2012) to consider ideas for better delivering the support currently provided through tax concessions to the NFP sector. The working group is expected to complete its work by December 2012. M Arbib (Assistant Treasurer) and M Butler (Minister for Mental Health and Ageing, Minister for Social Inclusion, Minister for Mental Health Reform), *Not-for-profit sector tax concession working group*, media release, no. 7, 12 February 2012, viewed 17 September 2012, http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/007.htm&pageID=003&min=mva&Year= &DocType=


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• provide guidance and education to assist NFP organisations to understand and meet their obligations under the new regulatory framework.

In order to assist in discharging the above responsibilities, the Commissioner would have powers to:

• monitor registered NFP organisations’ compliance with specified provisions and obtain information and documents to determine whether or not certain provisions have been, or are being, complied with
• issue written directions to NFP organisations and apply for injunctions where this is necessary to ensure compliance with specified provisions and
• ultimately, suspend or remove non-compliant NFP organisations from the register.

In order to gain registration and to remain registered, NFP organisations would be required to:

• meet governance and external conduct standards that are to be set out in regulations
• keep financial and written records and provide information statements (in the case of small NFP organisations) and financial reports and audit or review reports (in the case of large and medium NFP organisations) and
• notify the Commissioner of certain relevant changes in circumstance.

Committee consideration

House of Representatives Standing Committee on Economics—draft bills

Exposure drafts of the Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 were referred to the House of Representatives Standing Committee on Economics (House of Representatives Economics Committee) for inquiry and report. The Committee published its report on 15 August 2012.

The House of Representatives Economics Committee made a number of recommendations for changes to the draft Bills and the current versions of the Bills incorporate changes made in line with these recommendations.


52. For a summary of the changes made, see the Treasury submission to the Senate Standing Committee on Community Affairs Inquiry into the Bills at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/charities_commissi on/submissions.htm. See also D Bradbury (Assistant Treasurer, Minister Assisting for Deregulation) and M Butler

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Perhaps the most significant of the issues raised in relation to the draft Australian Charities and Not-for-profits Commission Bill 2012 were in relation to red-tape reduction, reporting duplication, procedural fairness requirements, the protection of private donor’s privacy, and NFP directors’ liability.

Red-tape reduction

A key concern of much of the NFP sector was that there should have been a greater emphasis in the Bill on the reduction of red-tape. Some submissions to the House of Representatives Economics Committee argued that the objects of the Bill should be amended to include a clear obligation on the part of the Government to reduce unnecessary administrative reporting and compliance obligations. Others argued that the Bill did not provide clear details on how the reporting burden placed on larger NFP organisations is to be reduced. In short, it was felt that the legislation should include the explicit objective of reducing red-tape. The House of Representatives Economics Committee agreed with these arguments and the Government took up its recommendation to include a clause in the objects of the Act section that states that the ACNC is to promote the reduction of unnecessary regulatory obligations on the Australian NFP sector (clause 15-5 of the Bill).

Reporting duplication

Some submissions recommended that the Commissioner should be given the discretion to accept financial reports submitted to other Australian government agencies as meeting the requirements of the ACNC Act. The House of Representatives Economics Committee supported this proposal in the interests of allaying NFP sector concerns about reporting duplication. It felt that during the transitional period in which reporting duplication problems are being worked through by different Commonwealth agencies and between the Commonwealth and the states and territories, ‘a flexible approach to reporting arrangements is in order’.

To this end, the Government amended the draft Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 (Consequential and Transitional Bill) so that a registered entity which is a body corporate would not be subject to the same reporting requirements under the Corporations Act and the ACNC Act. Rather, the financial reports and audit requirements of the

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Corporations Act would not apply. *(item 27 of Part 3 in Schedule 3 to the Consequential and Transitional Bill).*

**Procedural fairness**

Under the Bill, the Commissioner has a range of powers including the power to revoke registration of NFP organisations, suspend or remove organisations from the Register, and other enforcement powers. Some submissions expressed the concern that there was a lack of procedural fairness in the Bill. Some also felt that there were insufficient mechanisms to ensure that the procedural fairness requirements contained in the Bill would be complied with, if such powers were to be exercised.

The House of Representatives Economics Committee acknowledged the concerns about procedural fairness but noted the need for immediate action on the part of the Commissioner in instances where fraud or a criminal act might be imminent. As a result, it recommended that the draft Bill be amended to ‘provide that the Commissioner provide written notice of intent, and an opportunity for the entity to be heard, before a decision is enforced to revoke the registration of an entity or suspending or remove responsible entities’. 54 The Government responded by inserting a requirement that the Commissioner must give an entity a *show cause* notice and invite the entity to provide a written statement in response in these circumstances. 55 In this way, the current Bill would appear to allow for a greater degree of procedural fairness.

**Private donors’ privacy**

Some submissions from philanthropists expressed the concern that Private ancillary fund (PAF) donor identities could be disclosed under the ACNC Act as a matter of ‘public interest’. It was feared that this could both provoke unsolicited approaches for donations and compromise donors’ privacy. The House of Representatives Economics Committee could see ‘no public benefit in publishing the names of private donors where they seek to keep their philanthropy private’ and recommended that the Government ‘investigate ways to strengthen protection in the Bill for these private donors’. 56 The Government has done so by including a new power to make regulations to protect the privacy of private donors (subclause 40–10(2)).

**Directors’ liability**

Under the draft Bill, personal liability was imposed on directors of charities and NFPs in certain circumstances. A number of submissions expressed concerns about the extent of liabilities imposed under the Bill, arguing that these were more onerous than those enforced under corporate law and

54. Ibid., p. 69.  
55. Clause 35–15, paragraphs 100–10(4) and 100–15(3) of the Bill.  
56. Ibid., p. 56.  

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that this situation did not adequately reflect the different circumstances of the NFP sector (in which directors are essentially volunteers). It was suggested that the liability provisions should be better focused on instances of ‘dishonest, grossly negligent or reckless behaviour’, limited to criminal actions or removed from the Bill altogether. The House of Representatives Economics Committee recommended that the relevant section of the Bill be re-drafted to clarify its intent and operation and the Government has done so. Amendments have been made to the Bill to ensure that directors are only liable in circumstances such as those outlined above and that no criminal offences would apply to directors under the ACNC Act (clause 175–20).\(^{57}\)

**Conclusion**

In its overall conclusions, the House of Representatives Economics Committee observed that ‘charities and not-for-profits have been subject to an inefficient regulatory framework spread across many agencies and more than one level of government’ for some time, and that a national regulator for the sector has been ‘a long time coming’.\(^{58}\) The House of Representatives Economics Committee noted that consultation on the initial proposal for a national regulator and on the Bills themselves had been extensive, and that comprehensive changes had been made to the Bills to refine and improve them in a number of areas. The House of Representatives Economics Committee argued that the sector itself supports the change, and a majority recommended that, subject to its proposed changes being made, the Bills be passed.

**Dissenting report**

Coalition members of the House of Representatives Economics Committee shared many of the stakeholder concerns highlighted above. However, their main source of disquiet was the assessment that creation of the ACNC will not achieve the objective of reducing red tape for the NFP sector. On the contrary, the Coalition members argued that in the absence of demonstrable Government progress in reducing duplication across Commonwealth, state and territory agencies, or an agreement between the Commonwealth and the states and territories on reducing duplication, the ACNC will simply add a layer of regulation to existing requirements imposed on NFP organisations. Coalition members also expressed the view that the Bills did not go far enough in ‘making direct provisions to reduce red tape [with] no direct link between the reduction of red tape and the objectives and functions of the ACNC’.\(^{59}\)

Some of the Coalition members’ concerns and criticisms are likely to have been allayed, to a degree, by Government amendments to the draft Bills. However, others, such as the absence of an


\(^{58}\) Ibid., p. 74.

\(^{59}\) Ibid., p. 82.
agreement with the states and territories on reducing duplication, and the ‘lack of certainty’
associated with having governance standards for NFP organisations spelt out in regulations yet to be
determined by the Minister, are not. Coalition members of the Committee did not support the
passage of the Bills as originally drafted.

Current inquiries

On 23 August 2012 the Senate referred the Australian Charities and Not-for-profits Commission Bill
2012, Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012
and the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 to the
Senate Standing Committee on Community Affairs (Committee for Community Affairs) for inquiry
and report.60

On the same day, the House of Representatives referred the bills to the Parliamentary Joint
Committee on Corporations and Financial Services (Corporations and Financial Services Committee)
for inquiry and report.61

Submissions to both Committees closed on 30 August 2012, with the Parliamentary Joint Committee
reporting on 10 September 201262 and the Senate Committee on 12 September 2012.63

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has reported
on its concerns regarding the Bill.64 The Scrutiny of Bills Committee’s comments are canvassed in the
Key provisions part of this Bills Digest.

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60. See Senate Committees, viewed 20 September 2012,
61. See Senate Committees, viewed 20 September 2012,
62. Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into the Australian Charities and
    Not-for-profits Commission Bill 2012, the Australian Charities and Not-for-profits Commission (Consequential and
    Transitional) Bill 2012 [and] the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012,
    September 2012, viewed 18 September 2012,
63. Community Affairs Legislation Committee, Australian Charities and Not-for-profits Commission Bill 2012 [Provisions],
    Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 [Provisions] [and] Tax
    Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 [Provisions], Senate, Canberra,
    September 2012, viewed 18 September 2012,
64. Standing Committee for the Scrutiny of Bills, Alert Digest no. 10 of 2012, Senate, 12 September 2012, viewed
    13September 2012,

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sets out the status and purpose of the digest.
In addition, the Parliamentary Joint Committee on Human Rights (Parliamentary Human Rights Committee) has reviewed the Bill and reported some concerns in relation to the Bill. The Parliamentary Human Rights Committee’s comments are canvassed in the Key provisions part of this Bills Digest.

**Policy position of non-government parties/independents**

**Coalition**

As the Dissenting Reports from the inquiries by the Committee for Community Affairs and the Corporations and Financial Services Committee indicate, the Coalition does not support the Bills.

In an address to the Menzies Research Centre on 15 June 2012, Shadow Minister for Families, Housing and Human Services, Kevin Andrews, outlined the Coalition’s approach to the charitable sector. In this speech, among other things, Mr Andrews announced the Coalition’s intention, were it to gain government, to establish an independent charities commission.

As Mr Andrews sees it, over the past two decades or so, governments in Australia have increasingly directed the activities of civil society. In the process, he believes, they have both burdened the sector with unnecessary regulation and undermined the ability of communities to address problems for themselves through the institutions of civil society. While Mr Andrews argues that ‘there is a place for a national body to enhance the role of the institutions of civil society’, he rejects the need for ‘a whole new regulatory regime’. Indeed, he insists that a case has not been made of the need for strengthened regulatory powers in order to protect and enhance public trust and confidence in the NFP sector.

The Coalition proposes the establishment of a small commission that would be charged with advancing the NFP sector through its educative and training function and advocacy and representational roles. The commission would also liaise with the sector and governments to develop a new common financial and other reporting standard. In addition, the Coalition would introduce a range of measures calculated to simplify the reporting and contractual requirements for NFP agencies that deliver services to disadvantaged people.

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Australian Greens

One commentator has recently observed that, ‘despite widespread support from the sector to see the Bill passed, it is at real risk of not getting through Parliament’. Given that the Coalition has indicated that it will not support the Bill in its current form, ‘if the ACNC is to become the new regulator from October 1 as planned, winning support from the Australian Greens will be essential’.

The Greens have made a number of recommendations for changes to the Bills in the context of both the Senate and Joint Committee Inquiries. For the most part these recommendations seek to strengthen the Government commitment to reducing the regulatory burden for NFP organisations and to consult with the sector on the yet to be determined governance standards. With regard to these standards, the Greens have recommended that they be included in a schedule to the legislation rather than in regulations. The Greens have also supported the proposal that the independence of the sector should be bolstered through the insertion of a clause in the Bill that limits the powers of the government to insert ‘gag’ clauses into the governance standards.

It would appear that amendments passed in the House of Representatives are designed to allay these concerns.

It is interesting to note that neither the Parliamentary Committee on Human Rights nor the Compatibility Statement touched on issues around the right to political communications (article 25 of the ICCPR). Some of the controversy around the Bill has focussed on ‘gag clauses’ and governance standards, which in turn raise issues around these international standards. Subclause 45-10(6), which was inserted by Government amendments passed in the House of Representatives aims to address this issue, by providing that the governance standards must not require a registered entity not to comment on, or advocate for a change legal or policy change, if the comment or advocacy is lawful and it furthers, or is in aid of, the purpose of the registered entity. Broader concerns about the potential for the enforcement provisions in the Bill to be used to suspend or remove people from the governing bodies of NFP groups for political reasons, may still exist. However, it would

68.  Ibid.
69.  The additional comments in relation to the suite of Bills by the Australian Greens to the Parliamentary Joint Committee on Corporations and Financial Services can be viewed at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/charities/report/d02.htm

The additional comments in relation to the suite of Bills by the Australian Greens to the Senate Standing Committee on Community Affairs can be viewed at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/charities_commission/report/index.htm

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appear that any use of the provisions in this way would not be in keeping with the objects of the Bill (clause 15-5) and the manner in which the Commissioner is directed to exercise his or her powers (clause 15-10).

**Independents**

The only independent who appears to have voiced an opinion in relation to the Bills, and the ACNC more generally, is Senator Nick Xenophon.

For some time Senator Xenophon has argued that there is a need for greater transparency and accountability in relation to tax concessions and exemptions for NFP organisations. In his additional comments to the report by the Committee for Community Affairs, Senator Xenophon supported the establishment of the ACNC. However, he insisted that the powers of the Commissioner should be strengthened to enable the ACNC to better identify those NFP organisations whose claims to charitable or NFP status are questionable. To ensure that NFPs and charities do indeed operate for the benefit of the community (rather than the benefit of a few or to the detriment of the community), Senator Xenophon has recommended that the Bill be amended to include a Public Benefit Test. Such a test would need to be satisfied before an organisation could be registered or receive tax free status.

Senator Xenophon also recommended that all charities and NFP organisations should be required to register with the ACNC within 12 months of the commencement of the ACNC Act in order to receive any tax concessions. This would bring all NFPs within the regulatory ambit of the ACNC.

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71. On 7 September 2010, the Senate Economics Legislation Committee reported on its inquiry into Senator Xenophon’s Tax Laws Amendment (Public Benefit Test) Bill 2010. This Bill sought to amend the tax laws to require that religious and charitable institutions meet a public benefit test to justify their exemption from taxation. (The proposed test was similar to the public benefit test that currently applies to charities in the UK.)

   In its final report, the Committee emphasised that not-for-profit organisations should be ‘transparent and appropriately accountable’, thereby promoting ‘confidence that religious and charitable organisations receiving tax concessions generate a net benefit to the public, not just to their own members’. Senate Economics Legislation Committee, *Tax Laws Amendment (Public Benefit Test) Bill 2010*, Commonwealth of Australia, Canberra, 2010, p. 1, viewed 17 September 2012.

   As noted above, the Committee argued that the best way to increase transparency and accountability in the NFP sector would be to establish a single, independent national commission for NFP organisations.

72. See Senate Committees, viewed 20 September 2012,

73. Ibid., p. 60.

74. Ibid., p. 49.

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Position of major interest groups

Based on submissions on the Bills themselves and feedback from the NFP sector throughout the consultation process, a majority of the NFP sector is supportive of the current Bill and the ACNC, although there are still some concerns in relation to elements of the Bills and their formulation of the ACNC and its powers.

Main issues

The Government has undertaken extensive consultation with regard to the Bill, and the ACNC more generally. It has also made substantial changes to the draft Bill in response to sector feedback and the recommendations of the House of Representatives Economics Committee. As a result, while there are still some residual concerns with the Bill and the ACNC within the NFP sector, the sector as a whole appears to be broadly supportive of the establishment of the ACNC.

Cutting red tape

As the submissions to the House of Representatives Economics Committee inquiry and the Dissenting Report of the Coalition members suggest, the main outstanding issue is the question of whether or not, and how soon, the ACNC will result in less red-tape for NFP organisations. The Government has committed Treasury and the ACNC to working with other regulators (including state and territory regulators) to ensure that unnecessary regulation of the NFP sector is reduced. However, at this stage, it is unclear just how much progress has been, or is likely to be, made on this front.

Governance requirements

Another issue that appears to be of only slightly less concern to the sector is the governance requirements that are to be included in as yet unseen regulations. While the Government has committed to extensive consultation with the sector in the development of these regulations, there is nevertheless some apprehension as to just how consultative the process will be and what the requirements will end up looking like. In short, the NFP sector is being asked to place a deal of trust in this and future governments, and, as highlighted above, NFP sector trust in governments is something that has been in short supply in the recent past. However, it should be noted that the government amendments to the Bill passed by the House of Representatives insert clause 45–10 which requires that the NFP sector be consulted prior to the Minister making regulations which will establish governance standards.

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Constitutional coverage

Although the Final Report of the Scoping Study for a National Not-for-profit Regulator recommended that a single regulator should be established, the Commonwealth does not have the constitutional power to regulate the NFP sector on a comprehensive basis.\(^{75}\)

Under the Constitution, the Commonwealth is given legislative powers with respect to specific subject matters.\(^{76}\) The Commonwealth does not have any power specifically with respect to the not-for-profit sector. It must, therefore rely on a ‘patchwork’ of powers (such as the power with respect to taxation) to make laws in this area. The limits of this patchwork are uncertain, and unlikely to be sufficient to support comprehensive regulation of the not-for-profit sector.\(^{77}\)

That being the case, the Commonwealth would need the cooperation of the states to fill any gaps in coverage, by way of a referral of powers under section 51(xxxvii) of the Constitution. A Commonwealth, state and territory Not-for-profit Working Group has been set up to progress national regulation reforms, reporting to the Council of Australian Governments (CoAG) through the Standing Council of Federal Financial Relations.\(^{78}\)

These Constitutional limitations are reflected in Chapter 2 of the Bill, which links registration by the ACNC Commissioner to the continued access by a NFP entity to certain Commonwealth tax concessions.\(^{79}\)

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79. Clause 20–5 of the Bill.

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Financial implications

According to the Explanatory Memorandum\(^{80}\), establishing the ACNC and the resulting structural changes to the Australian Taxation Office has the following fiscal impact\(^{81}\):

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As already stated, the Government allocated $53.6 million over four years for the establishment of the Australian Charities and Not-for-Profits Commission (ACNC) as a part of the 2011–12 Budget. This amount is accounted for in the expense and capital lines above.

Key provisions

Establishing the ACNC, the Commissioner and the Advisory Board

Chapter 5 of the Bill establishes the Australian Charities and Not-for-profits Commission (ACNC)\(^{82}\) and the Commissioner of the ACNC.\(^{83}\) The Commissioner would have responsibility for the general administration of the proposed Act but would also have particular ‘assistance functions’:

- assisting registered entities in complying with the ACNC Act (when enacted)\(^{84}\) and
- 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 providing information to the public on the ACNC website.\(^{85}\)

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80. Explanatory Memorandum, p. 3.
82. Clause 105–5 of the Bill.
83. Clause 110–5 of the Bill.
84. The Digest will refer to the ACNC Act as it will be operating if it is enacted. This assumption is adopted simply to provide a more convenient terminology while discussing the possible future operation of the Act.

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The terms and conditions of the Commissioner’s appointment are set out in clauses 115–5 to 115–55 of the Bill. In particular, the Commissioner is appointed by the Governor-General on a full time basis for a period of up to five years and the terms of appointment are fairly standard for comparable statutory appointments. Thus, for instance, the Bill sets out those circumstances under which the Governor-General may terminate the appointment of the Commissioner which are similar to other appointments of independent statutory office holders, and include matters such as physical or mental incapacity, bankruptcy and lengthy unexplained absences.

The Commissioner may have regard to the advice and recommendations given to him, or her, by the Advisory Board. The Advisory Board is established by the provisions of Chapter 6 of the Bill. Under clause 135–10, the Advisory Board consists of up to eight ‘general members’ who have expertise relating to not-for-profit entities or experience and qualifications in the areas of law, taxation or accounting. The Minister can also determine that the Board should include certain holders of an office. The Explanatory Memorandum does not speculate on possible office-holders, but one could imagine that the Human Rights Commissioner, or the President of the Administrative Review Council would both be conceivable participants. The Advisory Board’s role is limited to providing advice and making recommendations to the Commissioner at his, or her, request about the Commissioner’s functions.

The terms and conditions of the appointment of members of the Advisory Board are set out in clauses 140–5 to 140–35 of the Bill. In particular, the general members of the Advisory Board are appointed by the Minister on a part time basis for a period of up to three years. The Bill provides that the Minister may terminate a general member’s appointment at any time.

Registration

Who is entitled to register?

Clause 20–5 makes it clear that registration of a not-for-profit ‘entity’ by the ACNC Commissioner is a prerequisite for accessing certain Commonwealth tax concessions.

Clause 25–5 of the Bill provides for registration by type and sub-type. The only ‘type’ of entity covered by this Bill is a ‘charity’. Subclauses 25–5(4) and (5) provide that a ‘charity’ can register under one or more of the subtypes of entity. The meaning of ‘charity’ is not defined in the Bill.

85. Clause 110–10 of the Bill.
86. Clause 110–20 of the Bill.
87. An ‘entity’ is defined in clause 205–5 as an individual, a body corporate, a body politic, any other unincorporated association or body of persons, or a trust.
88. The nature of the tax concessions is not canvassed by this Bill.
89. As mentioned above, it was suggested by the Henry Review that the task of modernising and codifying the definition of a charity should be left to its proposed ‘charities commission’.

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however the relevant sub-types are set out in the table in subclause 25–5(5) and reflect and extend traditional definitions of what constitutes charitable causes:

- the relief of poverty, sickness or the needs of the aged
- the advancement of education
- the advancement of religion
- a purpose that is beneficial to the community
- an institution whose principal activity is to promote the prevention or the control of diseases in human beings
- a public benevolent institution and
- provision of child care services.90

To register, an entity must also satisfy all of the following conditions:

- the entity is both a not-for-profit entity: paragraph 25–5(3)(a) and a charity: subclause 25–5(5)
- the entity is in compliance with the governance standards and external conduct standards which are set out in regulations as provided for under clause 45–10: paragraph 25–5(3)(b)
- the entity has an ABN: paragraph 25–5(3)(c)
- the entity has not been characterised under an Australian law as engaging in, or supporting, terrorist or other criminal activities: paragraph 25–5(3)(d) and
- if the entity has previously been a registered entity, but its registration as a type of entity has been revoked—the Commissioner is satisfied that the matters which led to the revocation have been dealt with such that the registration of the entity would not conflict with the objects of the ACNC Act (when enacted): paragraph 25–5(1)(c).

Registration decisions to be made within time limits

Generally the time limit for approving applications is 60 days after the application is made. If the Commissioner has not given the applicant a written notice of registration within that time, and the Commissioner has not requested additional information from the applicant, then at the end of the 60th day, the applicant may give the Commissioner written notice that he or she wishes the application to be treated as having been refused: subclause 30–15(2). In that case, Part 7–2 of the Bill provides for rights of review of the decision by the Commissioner and a subsequent right of appeal of that decision by the Administrative Appeals Tribunal (AAT) or a court.

90. Items 1–4 in the table reflect the four categories of charitable purposes which are well established in the common law. They were first identified by the House of Lords in Commissioners for Special Purposes of Income Tax v Pemsel [1891-1894] All ER Rep 28, viewed 6 September 2012, http://www.bailii.org/uk/cases/UKHL/1891/1.html and were recently explored by the High Court in Aid/Watch Incorporated v Commissioner of Taxation [2010] HCA 42, viewed 16 September 2012, http://www.austlii.edu.au/au/cases/cth/HCA/2010/42.html.

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Revocation of registration

In addition to the power to register an entity, the Commissioner can also revoke an entity’s registration.

Clause 35–10 authorises the Commissioner to revoke the registration of an entity if the Commissioner reasonably believes that any of the following conditions is satisfied:

- the entity is not, or was not, entitled to registration
- the registered entity provided information to the Commissioner in support of its registration that was false or misleading
- the registered entity contravened a provision of the ACNC Act, or it is likely that the entity will do so
- the registered entity has not complied with a governance standard or external conduct standard, or it is likely the entity will fail to do so
- the registered entity has a trustee in bankruptcy, a liquidator or an administrator as it is unable to pay its debts as and when they are payable or
- the registered entity has requested the revocation.

In deciding whether to revoke the registration of an entity, the Commissioner must take into account all of the matters listed in subclause 35–10(2). This subclause requires consideration of matters such as the nature, significance and persistence of any contravention of relevant requirements, the desirability of ensuring that contributions to the registered entity are applied consistently with the not-for-profit nature and the purpose of the registered entity, and the welfare of members of the community that receive direct benefits from the registered entity.

The Commissioner must give the entity a written notice of the decision to revoke registration, and the specified day of revocation, within 14 days of revocation of registration: subclauses 35–10(3) and (4). Any decision to revoke registration is subject to the review and appeal mechanism set out in Part 7–2 of the Bill.

Before the Commissioner makes a decision to revoke registration, the Commissioner must give a written ‘show cause notice’ to the entity setting out the grounds for the proposed revocation of registration and giving the entity 28 days to provide a written statement showing cause why the registration should not be revoked: subclauses 35–15(1) and (2). Whilst these provisions would appear to ensure natural justice to a registered entity, it should be noted that subclause 35–15(3) contains an exception to the general rule. It empowers the Commissioner to revoke the registration of an entity without first issuing a ‘show cause notice’ if the Commissioner believes, on reasonable grounds, and taking into account the matters listed in subclause 35–10(2) that it would be appropriate to do so.

The Scrutiny of Bills Committee was critical of the Commissioner’s power to revoke registration without first issuing a show cause notice under subclause 35-15(2) stating:

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... the Committee expects that the common law requirements of natural justice would still be applicable. The explanatory memorandum does not suggest otherwise and the exclusion of the show cause statutory requirement in limited circumstances does not evince a sufficiently clear legislative intention to exclude the rules of natural justice, including the fair hearing rule. Thus, common law procedural fairness obligations would continue to be applicable even in circumstances where a show cause requirement was removed.91.

The Bill’s explicit provision allowing the Commissioner to bypass the show cause notice would seem on first examination a clear legislative intention to exclude the rules of natural justice, although it is implied rather than explicit. The fact that the legislation clearly envisages cases in which some serious breach of conditions has occurred and which may warrant immediate action may also militate against the application of the common law’s rules of natural justice.

Information on the Register

The Commissioner is required to maintain a register, being the Australian Charities and Not-for-profits Register (the Register); and to publish the Register on the ACNC website: subclauses 40–5(1) and (4). Some of the information is common place, that is, the entity’s name, contact details, ABN, the type and subtype of entity as which it has been registered, and the entity’s governing rules. The same information for each ‘former registered entity’92 also must be included. However, the Bill requires further information to be maintained on the Register including:

- specified information about each ‘responsible entity’ of a registered entity93: paragraph 40–5(1)(c)
- information statements, financial reports, and any audit or review reports, given by registered entities94: paragraphs 40–5(1)(d) and (e)
- the details of:
  - each warning95 and each direction issued to a registered entity by the Commissioner96 and each undertaking given by a registered entity and accepted by the Commissioner97
  - each injunction to restrain a registered entity from contravening the ACNC Act98 and

92. The term ‘former registered entity’ is defined in clause 300–5 as an entity that is not a registered entity, but that used to be a registered entity.
93. The term ‘responsible entity’ of a registered entity is defined in clause 205–30 as including the director of a registered entity that is a company, a trustee of a registered entity that is a trust and a trustee in bankruptcy, a receiver, administrator, liquidator or any other entity administering a compromise or arrangement made between the registered entity and someone else.
94. Division 60 of the Bill sets out the reporting requirements for registered entities.
95. Division 80 of the Bill provides for the giving of warnings by the Commissioner.
96. Division 85 of the Bill provides for the giving of directions by the Commissioner.
97. Division 90 of the Bill provides for the making and acceptance of enforceable undertakings.
98. Division 95 of the Bill provides for the granting of injunctions and interim injunctions.

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Clause 40–10 provides for two types of regulation making powers in relation to the withholding or removal of information from the Register.

The first of the regulation making powers is contained in subclause 40–10(1) which provides for regulations setting out the circumstances in which the Commissioner must not include, or must remove, certain information.

The second of the regulation making powers is contained in subclauses 40–10(2) and (3) which provide for circumstances (including the making of regulations) in which the Commissioner may decline to include information on the Register or may remove information—subject to a public interest test.

According to the Scrutiny of Bills Committee:

The explanatory memorandum, at page 56, contains a detailed explanation for [the use of regulation making powers to prescribe the inclusion or removal of information]. It is argued that certain types of information may adversely affect the privacy of individual donors and “could potentially reduce philanthropic engagement” and that the regulation making power thus “provides an additional safeguard mechanism to ensure that inappropriate information would not be published on the ACN Register.”

In addition, the Bill authorises the Commissioner to remove the information which is published under paragraph 40–5(1)(f) where the information has been on the Register for more than five years and the Commissioner considers that the public interest is not served by the information being retained on the Register: subclause 40–10(4).

The majority report by the Committee for Community Affairs endorses these provisions as suitable to the purpose of ensuring accountability and transparency. However, the dissenting report by the Greens expresses some concern about the effect of the provisions noting that:

Warning notices that are issued by the commission are published online after fourteen days for a minimum of 5 years... [Submitters] raised concerns that this carries significant reputational risk, particularly if the ACNC is successful in its aim to create an information portal that donors can use to assure themselves of the accountability and good management of a particular charity.

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99. Division 100 of the Bill provides for the suspension and removal of responsible entities.
100. Standing Committee for the Scrutiny of Bills, op. cit., p. 2.
In this instance, the Government should have regard to the need to publish warnings, particularly when the compliance issue is minor and quickly resolved through education and an undertaking from the entity to resolve the issues, or is successfully appealed.101

The Greens go on to recommend:

That the Government should clarify the circumstances in which warning notices will be posted online and have regard for the reputational risk this imposes on charities that are acting in good faith.102

Another approach might have been to give the Commissioner a broader discretion to remove notices before the mandatory five year period expires. The Bill gives the Commissioner certain powers to remove information from the Register if it ‘has the potential to cause detriment to the registered entity (or former registered entity) to which it relates, or to an individual...’103

There is also provision made for regulations to give the Commissioner further powers to remove information from the Register.104

Responsibilities of registered entities

Governance and external conduct standards

Clause 45–10 of the Bill provides for the making of regulations which specify governance standards.

Governance is concerned with the practices and procedures put in place to ensure that an entity is run in such a way that it achieves its objectives in an effective and transparent manner. For NFPs, governance is focussed on how they deliver their mission in the most appropriate way, with due regard for legal requirements, accountability, stakeholder expectations and even ethical considerations.105

Similarly, clause 50–10 of the Bill provides for the making of regulations which specify external conduct standards.106 The power to make regulations under both clauses is broadly drawn. In relation to the external conduct standards the Explanatory Memorandum states:

101. Standing Committee on Community Affairs, op. cit., p. 57.
102. Ibid.
103. Proposed subparagraph 40-10(2)(a)(ii) of the Bill.
104. Proposed subclause 40-10(1) of the Bill.
106. Subclause 50–10(3) of the Bill provides that the external conduct standards must deal only with matters external to Australia, or matters not external to Australia but that are closely related to, or have, or will have, a significant impact on entities, things or matters external to Australia.

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The purpose of these external conduct standards is to prevent Australian registered entities providing support [for terrorist and other criminal activities] in the future and so promote transparency and confidence across the sector and the general public that charitable funds and services are applied for legitimate purposes, and are not contributing to terrorist or other criminal activities (from an Australian perspective).\(^{107}\)

The effect of these provisions is that a framework for the making of the key accountability and conduct standards for not-for-profit entities is left to be developed in regulations. It should be noted that compliance with both of these standards is a condition of entitlement to registration.\(^{108}\)

According to the Scrutiny of Bills Committee:

... the wide range of registered entities is a reason why governance standards may not be applied (by the regulations) in a uniform way. There are, therefore, some sound reasons why setting governance standards in regulations may be necessary to promote the approach to regulation which is taken in the Bill.

On the other hand, it is less clear why the ‘external conduct standards’ should not be provided for in the primary legislation. These standards will regulate behaviour in relation to matters external to Australia or which are closely related to such matters. The standards will bind all registered entities. The explanatory memorandum indicates, at page 64, that these standards are “expected to be based on the requirements of the Financial Action Task Force’s (FATF) Special Recommendation VIII, and help combat the terrorist and criminal activities covered in the FATF recommendation”. The explanatory memorandum also states, at page 65, that these standards will “promote transparency and greater confidence in the sector, across the donor community and with the general public that charitable funds sent, and services provided, overseas are reaching legitimate beneficiaries and being used for legitimate purposes”.

The importance of the standards does not, however, explain why they should be developed in regulations rather than the primary legislation. Indeed, the importance of these standards is a strong reason for including them in the primary legislation, unless there are compelling considerations to the contrary.\(^{109}\)

Other concerns have been raised regarding the making of regulations after the passage of the Bill, for instance the Financial Review reports that the Greens are concerned to ensure community consultation before the passage of regulations:

That the consultation process and governance rules will be “left to a delegated legislation order which is a disallowable instrument is of much more concern,” says Siewert ... Stipulating a requirement for a consultation process, even if that process is not prescribed, in the legislation is

\(^{107}\) Explanatory Memorandum, p. 64.

\(^{108}\) The only exception is that a ‘basic religious charity’ (defined at clause 205-35) does not have to comply with the governance standards: subclause 45–10(5).

\(^{109}\) Standing Committee for the Scrutiny of Bills, op. cit., pp. 2—3.
one possible solution. “There are a number of state based pieces of legislature in utilities that can serve as a model,” says Siewert.\textsuperscript{110}

The Legislative Instruments Act 2003 provides some guidance in this area. Section 17 requires rule makers to consult before making legislative instruments, particularly where the proposed instrument is likely to have a direct, or a substantial indirect, effect on business, or restrict competition. Subsections 17(2) and (3) of the Legislative Instruments Act set out what is to be taken into account in deciding whether the consultation was appropriate and the form of the consultation respectively.

Although consultation is not required in all circumstances\textsuperscript{111} and a failure to consult does not affect the validity of a legislative instrument\textsuperscript{112}, section 17 of the Legislative Instruments Act does provide a legislative guide to the making of regulations.

Record keeping and reporting

Subclauses 55–5(6) and (7) create a criminal offence of strict liability (that is, a fault element does not have to be satisfied) attracting a financial penalty in the event that a registered entity contravenes the requirement to keep certain written records.\textsuperscript{113} Importantly, the imposition of strict liability will not criminalise honest errors and a person can not be held liable if he, or she, had an honest and reasonable belief that they were complying with relevant obligations.\textsuperscript{114}

The reporting requirements are as follows:

- all registered entities must provide an ‘information statement’ for a financial year in the approved form\textsuperscript{115} by no later than 31 December in the following financial year: clause 60–5
- medium and large entities\textsuperscript{116} must also provide an ‘annual financial report’: clause 60–10\textsuperscript{117}

\begin{footnotesize}
12. Section 19 of the Legislative Instruments Act., ibid.
13. The financial penalty is 20 penalty units, which is equivalent to $2200.
15. Clause 190–10 contains the provisions relating to approved forms.
16. According to clause 205–25, a registered entity is a ‘small registered entity’ for a financial year if its revenue is less than $250 000 (or another amount prescribed by regulations); a registered entity is a ‘medium registered entity’ for a financial year if it is not a small registered entity and its revenue is less than $1 000 000 (or another amount prescribed by regulations); a registered entity is a ‘large registered entity’ for a financial year if it is neither a small registered entity nor a medium registered entity.
17. Annual financial reports must comply with the requirements of clauses 60–15 to 60–55.
\end{footnotesize}
• the Commissioner may determine in writing that additional reports are required in particular circumstances—for example, where the Commissioner is concerned about compliance with the ACNC Act: clauses 60–70 to 60–80 and
• in order to cut down on red tape, the Commissioner may allow two or more registered entities to prepare and lodge a single information statement, or single financial report: clauses 60–95 to 60–105.

Notably, a ‘basic religious charity’ which is defined in subclause 205–35(1) as an entity with a purpose that is only the advancement of religion, is exempt from the requirement to provide an annual financial report (as is a small registered entity). A ‘basic religious charity’ cannot be entitled to be registered as any other subtype of entity, so, for instance, it cannot be a religious charity which also has the purpose of relieving poverty, sickness or the needs of the aged. There are numerous qualifications to this general definition in subclauses 205–35(2) to 205–35(5) which operate to significantly limit the number of entities which will satisfy the definition. The rationale for this limitation would appear to be that basic religious charities are exempted from some of the provisions of the Bill.

Clause 60–95 provides that the Commissioner may allow two or more registered entities (a ‘reporting group’) to prepare and lodge a single information statement and a single financial report for a financial year. In exercising the power to allow entities to form a ‘reporting group’ the Commissioner must consider a range of matters set out in subclause 60–95(4) of the Bill.

Regulatory powers of the Commissioner

The Commissioner may give a written notice to a registered entity requiring it to provide information, attend and give evidence before the Commissioner, to produce documents, or to produce copies of documents to the Commissioner, within the period, and in the manner and form, set out in the notice: subclause 70–5(2). An entity which is subject to such a notice commits an offence if it does not comply with the requirements of the notice: subclause 70–5(4). Importantly an entity is not excused from giving information or producing documents, or copies of documents on the ground that doing so might tend to incriminate the entity or expose the entity to a penalty: subclause 70–25(1). However, in the case of an individual, the information given or document produced is not admissible in evidence against the individual in most criminal proceedings or in proceedings to recover most civil penalties: subclause 70–25(2). Those proceedings that are excluded from this general rule are:

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118. Section 4AA of the Crimes Act 1914 provides that in a law of the Commonwealth ‘penalty unit’ means $110. In this case, the financial penalty is 20 penalty units, which is equivalent to $2200.
119. ‘The common law privilege against self-incrimination will protect a natural person complying with a notice to disclose information or documents under a notice to produce or attend, unless the privilege is expressly or impliedly overridden’ by legislation. ‘The privilege is relevant for regulatory schemes because it entitles a person to refuse to answer a question put to him or her by an authorised officer under a regulatory scheme on the basis that he or she

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• proceedings for an offence against subsection 70-5(4)—that is, a failure to comply with a notice by the Commissioner to attend and give evidence, or produce a document or copy of a document
• proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* (which deal with false or misleading information or documents) that relates to the ACNC Act or
• proceedings for an offence against section 149.1 of the *Criminal Code* (which deals with obstruction of Commonwealth public officials) that relates to the ACNC Act.

Monitoring powers

**Clauses 75–5 and 75–10** provide that certain provisions and certain information respectively are ‘subject to monitoring’. An ‘**ACNC officer**’ has ‘monitoring powers’ in relation only to those provisions and that information. Under **clauses 75–20** to **75–30**, the monitoring powers include the power to:

• search premises and any thing on the premises
• examine or observe any activity conducted on the premises
• inspect, examine, take measurements of, or conduct tests on, any thing on the premises
• make any still or moving image or any recording of the premises or any thing on the premises
• inspect any document on the premises
• take extracts from, or make copies of, any such document
• take onto the premises such equipment and materials as the ACNC officer requires for the purpose of exercising powers in relation to the premises
• sample any thing on the premises
• operate electronic equipment on the premises to put the relevant data in documentary form and remove the documents so produced from the premises and to transfer the relevant data to a disk, tape or other storage device and
• secure evidence of a contravention for a period not exceeding 24 hours in certain circumstances.

An ACNC officer may enter any premises and exercise those monitoring powers only if the occupier of the premises has consented to the entry, or the entry is made under a monitoring warrant:

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subclause 75–15(2). Clause 75–85 sets out the information which must be contained in the application for a warrant, before it is issued by the ‘issuing officer’.121

Statement of compatibility with human rights

Article 17 of the International Covenant on Civil and Political Rights (ICCPR)122 provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Information gathering and monitoring powers, as well as collecting, using, storing, disclosing or publishing personal information, amount to an interference with privacy. In order for the interference not to be ‘arbitrary’, the interference must be for a legitimate objective and be reasonable, necessary and proportionate to that objective.

It is in relation to the information gathering and monitoring powers contained in the Bill that the Parliamentary Human Rights Committee expressed concern, noting that the statement of compatibility for the Bill states that ‘these powers are intended to meet the legitimate objective of regulating the [not for profit] sector’.123 The Parliamentary Human Rights Committee stated:

The statement of compatibility concludes that these provisions are consistent with Article 17 of the ICCPR because privacy interests are protected ‘through having specific conditions that are required to be satisfied prior to using these powers’ and that ‘by providing these additional safeguards, the provisions that facilitate investigation are reasonable and necessary in the circumstances and required to meet the objects of the Bill’. The committee notes that the statement does not specify what these conditions and safeguards may encompass.

The committee notes that the ACNC Commissioner can exercise information gathering powers if ‘reasonably necessary’ for the purposes prescribed in the bill (subsection 70-5). The standard of ‘reasonably necessary’ would appear to be lower than the standard of ‘necessary’ and may not fully reflect the requirement that interferences with the right to privacy must be necessary to achieve a legitimate objective.124

Enforcement powers

The Bill authorises the Commissioner to exercise a range of enforcement powers to:

- issue warning notices
- issue directions
- enter into enforceable undertakings

121. Under clause 300–5, the term ‘issuing officer’ means a magistrate or a Federal Magistrate.
123. Parliamentary Joint Committee on Human Rights, op. cit., p. 5.
124. Parliamentary Joint Committee on Human Rights, op. cit., p. 5.

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Constraints on the enforcement power

The exercise of the enforcement powers is dependent upon a number of factors. First, the Commissioner must reasonably believe that a registered entity has contravened a provision of the ACNC Act or has not complied with a governance standard or an external conduct standard; or the Commissioner must reasonably believe that it is ‘more likely than not’ that an entity will contravene a provision of the ACNC Act or that it is ‘more likely than not’ that the entity will not comply with a governance standard or an external conduct standard.

The requirement that the Commissioner ‘reasonably believe’ means that the Commissioner must make a judgement, in the context of the relevant legislation. The requirement that the Commissioner must take account of the matters listed in subclause 35–10(2) in deciding whether to exercise the enforcement powers, is consistent with this notion. The effect of this requirement is that mere suspicion or rumour will not be enough to trigger the use of the enforcement powers.

Second, the exercise of the enforcement powers is constrained so that the Commissioner can only address the specific contravention or (threatened) non-compliance.

Third, the Commissioner may generally only use the enforcement powers against a ‘federally regulated entity’. A ‘federally regulated entity’ is a constitutional corporation, a trust (all of the trustees of which are constitutional corporations), a body corporate that is taken to be registered in a Territory under section 119A of the Corporations Act 2001, a trust (if the proper law of the trust and the law of the trust’s administration are the law of a territory), or an entity, the core or routine activities of which are carried out in or in connection with a territory. These are all bodies over which the Commonwealth has a clear constitutional power. The Commissioner can exercise enforcement powers in relation to the external conduct standards over all registered entities. (The external conduct provides constitutional power over a wider range of bodies).

Warnings and directions

Clause 80–5 provides for the Commissioner to issue a written warning to:

- apply to the courts for injunctions
- suspend or remove responsible entities and
- appoint acting responsible entities.125

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125. These enforcement powers are commensurate with those of the Australian Competition and Consumer Commission, Australian Securities and Investments Commission and the Australian Prudential Regulatory Authority.
126. That is, the same matters that the Commissioner must consider in deciding whether to revoke registration.
127. A ‘constitutional corporation’ is a corporation to which paragraph 51(xx) of the Constitution applies, or a body corporate that is incorporated in a territory: clause 205–20.
128. Clause 205–15 defines the term ‘federally regulated entity’.

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• a ‘federally regulated entity’—where the Commissioner reasonably believes that it has contravened, or is more likely than not to contravene, a provision of the ACNC Act or a governance standard paragraphs 80–5(1)(a) and (b), and
• any registered entity—where the Commissioner reasonably believes that it has not complied, or it is more likely than not that the registered entity will not comply, with an external conduct standard: paragraph 80–5(1)(c).

The formal warning is a written notice given to the registered entity providing information about the circumstances of the contravention or non-compliance and warning the registered entity of the action that may be taken in response to the contravention or non-compliance. The expected response to the warning is that entities will self-correct and no further action will be needed. This is consistent with the Commissioner’s function of assisting registered entities in complying with, and understanding, the ACNC Act (when enacted) by providing them with guidance and education: subclause 110–10(1). As discussed above, the Act would require the details of a warning to be published on the Register for at least five years, unless the Commissioner has reason to remove the warning. 129

Clause 85–5 empowers the Commissioner to give a written direction (to do, or not do, an act or class of acts) in the same circumstances as for a written warning as outlined above. As with the issuing of a warning, the Commissioner must reasonably believe that the circumstances warrant the giving of directions taking into account the matters listed in subclause 35–10(2). The Commission must specify the grounds on which the direction is given and the time by which, or the period during which, the registered entity must comply with the direction: subclause 85–5(3). A registered entity commits an offence if it does, or fails to do, an act in contravention of the Commissioner’s direction: clause 85–30. 130 Importantly, subclause 85–30(2) provides that the registered entity commits the offence on the first day on which the offence is committed and on each subsequent day that the circumstances giving rise to the offence continue. The effect of this provision is that the penalty may accrue daily until the day of conviction or some later time.

Enforceable undertakings, orders and injunctions

Clause 90–10 authorises the Commissioner to accept the following written undertakings:

• from a federally regulated entity—to take, or refrain from taking, a specified action in order to comply with a provision that is ‘enforceable’ 131; or to take a specified action to ensure that the

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129. Paragraph 40–5(1)(f) requires the details of a warning to be published on the Register.
130. The penalty is 40 penalty units which is equivalent to $4400.
131. Clause 90–5 provides that the provisions that are ‘enforceable’ are (a) a provision of the ACNC Act (when enacted), (b) a governance, or external conduct, standard and (c) a provision of a legislative instrument made under the ACNC Act.

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entity does not contravene, or is more likely than not to not contravene, a provision that is enforceable: subclause 90–10(1) and
- from a registered entity—to take, or refrain from taking, a specified action in order to comply with an external conduct standard; or to take a specified action to ensure that the entity does not contravene, or is more likely than not to not contravene, an external conduct standard: subclause 90–10(2).

Under clause 90–15, where the Commissioner considers that the entity has breached its written undertaking, the Commissioner may apply to a ‘designated court’ for an order directing the entity to do any or all of the following:

- comply with the undertaking
- pay to the Commonwealth an amount no greater than the amount of financial benefit that the entity has obtained as a result of the breach
- compensate any other entity that has suffered loss or damage as a result of the breach and
- any other order the court considers appropriate.

Suspension and removal of responsible entities

As already stated, the ‘responsible entity’ of a registered entity includes the director of a registered entity that is a company, a trustee of a registered entity that is a trust and a trustee in bankruptcy, a receiver, administrator, liquidator or any other entity administering a compromise or arrangement made between the registered entity and someone else.133

Division 100 sets out the power of the Commissioner to suspend or remove a responsible entity of a registered entity. It should be noted that the Commissioner cannot exercise this power in relation to a ‘basic religious charity’.134 The Commissioner’s power under Division 100–B is constrained in the same way as for the other enforcement powers.

Before suspending a responsible entity the Commissioner must give a show cause notice in the same manner as for the revocation of a registration.135

Consistent with the other provisions in the Bill, subclause 100–10(9) requires the Commissioner to take into account the matters set out in subsection 35–10(2) in making the decision to suspend a responsible entity. Once the decision to suspend has been made, the Commissioner must notify the

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132. Under clause 300–5, ‘designated court’ means (a) the Federal Court of Australia, or (b) a Supreme Court of a state or territory that has jurisdiction in relation to matters arising under the ACNC Act.
133. Clause 205–30 of the Bill.
134. Clause 205–35 of the Bill defines the term. See the discussion under the heading ‘Record keeping and reporting’.
135. Note that the Scrutiny of Bills Committee commented on this provision in the same terms as for subclauses 35–15(2) and (3).

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responsible entity in writing of the decision, including the reasons for the decision and the time that
the suspension ends: subclause 100–10(3).

Clause 100–15 provides for the Commissioner to remove any of the responsible entities in similar
terms.

Part 7–2 of the Bill sets out the rights of review of the decision by the Commissioner and a
subsequent right of appeal of that decision by the AAT or a court where the responsible entity
disagrees with the decision to suspend or remove.

Clause 100–25 creates three offences with penalties of imprisonment for one year, or 50 penalty
units, or both.\textsuperscript{136} Two of the offences arise in the event that a responsible entity which has been
suspended or removed:

\begin{itemize}
  \item makes, or participates in making, decisions that affect (in whole or in part) the business of the
  registered entity: subclause 100–25(1) and
  \item exercises the capacity to affect significantly the registered entity’s financial standing:
  subclause 100–25(2).
\end{itemize}

The third offence arises under subclause 100–25(3) where the responsible entity is an individual
who has been suspended or removed and:

\begin{itemize}
  \item the individual communicates his or her instructions or wishes to the remaining responsible
  entities of the registered entity knowing that those responsible entities are accustomed to act in
  accordance with his, or her, instructions or wishes, or intending that those responsible entities
  will act in accordance with those instructions or wishes and
  \item the communication of those instructions or wishes is not advice given by the individual in the
  proper performance of functions attaching to his, or her, professional capacity or business
  relationship with the remaining responsible entities of the registered entity.
\end{itemize}

The Scrutiny of Bills Committee noted that the offences have the purpose of discouraging the
responsible entity from continuing to participate in, or influence, the operations of the registered
entity in defined circumstances. The Committee noted that:

\begin{quote}
  Strict liability only applies to the element of the offence requiring that the entity has been either
  suspended or removed under the relevant provisions in the legislation. Nevertheless, given that
  the offence is punishable by imprisonment the Committee seeks the Treasurer’s further advice
  as to why strict liability is appropriate.\textsuperscript{137}
\end{quote}

\textsuperscript{136} The penalty is equivalent to $5500.

\textsuperscript{137} Standing Committee for Scrutiny of Bills, op. cit., pp. 4–5.

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sets out the status and purpose of the digest.
It would appear that the strict liability offences are designed to act as a deterrent to fraud within registered entities.

**Appointment of acting responsible entities**

Under subclauses 100–30(1) and (2) respectively, where a responsible entity has been suspended, the Commissioner *may* appoint one or more persons (the *acting responsible entities*) to act in the place of the responsible entity for the period of suspension. Where the Commissioner suspends all the directors of a company, or all the trustees of a trust, the Commissioner *must* appoint one or more persons (the *acting responsible entities*) to act in the place of the suspended directors or trustees for the period of suspension.

Importantly, under subclauses 100–30(3) and (4) respectively, where a responsible entity has been removed, the Commissioner *may* appoint one or more persons (the *acting responsible entities*) to act in the place of the removed responsible entity until all of the vacancies created by the removal are filled. Where the Commissioner removes all the directors of a company, or all the trustees of a trust, the Commissioner *must* appoint one or more persons (the *acting responsible entities*) to act in the place of the removed directors or trustees until at least one of the vacancies created by the removal are filled.

With respect to *acting responsible entities* the Commissioner may:

- determine the terms and conditions of appointment: clause 100–40
- terminate the appointment at any time: clause 100–45
- give a written notice directing the *acting responsible entities* to do, or not to do, one or more specified acts, or things, in relation to the registered entity: clause 100–60.\(^{138}\)

**Special provisions about acting trustees**

Clause 100–65 applies where the Commissioner has appointed acting responsible entities to act in place of a suspended or removed trustee. The clause requires the Commissioner to make a written order vesting the property of the registered entity in the acting responsible entity and, if the appointment ends, to make a subsequent written order vesting the property of the registered entity in the relevant body.\(^{139}\)

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\(^{138}\) The *acting responsible entity* commits an offence if it engages in conduct that contravenes a notice given by the Commissioner under subclause 100–60(1). The penalty for the offence is 40 penalty units which is equivalent to $4400.

\(^{139}\) Clause 185–10 provides for the Commonwealth to pay a reasonable amount of compensation to a person where the operation of the ACNC Act results in an acquisition of property from the person otherwise than on just terms.

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Clause 100–70 creates two strict liability offences. The first offence arises where the former trustee/trustees do not, within 14 days of the Commissioner making a property vesting order, give the acting responsible entity all of the books relating to the registered entity’s affairs that are in the former trustee’s/trustees’ possession, custody or control.

The second offence arises where the former trustee/trustees do not, within 28 days of being given a notice in writing by the acting responsible entity, comply with the requirement in the notice. The relevant notice may be to identify property of the registered entity and explain how the trustee/trustees have accounted for that property; or to take specified action to bring about the transfer of specified property to the acting responsible entity.

The penalty for both offences is 50 penalty units which is equivalent to $5500. Contravention of the terms of subclauses 100–70(1) and (5) of the Bill will amount to a criminal offence of strict liability attracting a financial penalty. For an offence of strict liability created under a law, there are no fault elements for any physical elements of the offence and the defence of mistake of fact is available. Importantly, the imposition of strict liability will not criminalise honest errors and no person can be held liable if he or she had an honest and reasonable belief that they were complying with the relevant obligations. 140

Miscellaneous measures

Secrecy

Part 7–1 of the Bill contains provisions which protect confidential and personal information given to the ACNC and regulates the circumstances in which protected information can be disclosed.

Clause 150–15 defines ‘protected ACNC information’ as information which satisfies all of the following conditions:

- it was disclosed or obtained under or for the purposes of the ACNC Act
- it relates to the affairs of an entity and
- it identifies, or is reasonably capable of being used to identify, the entity.

An ACNC officer cannot be required to produce a document containing ‘protected ACNC information’ or to disclose ‘protected ACNC information’ to a court or tribunal—except where it is necessary to do so for the purposes of giving effect to the ACNC Act. According to the Explanatory Memorandum:

140. The Scrutiny of Bills Committee has sought the Treasurer’s further advice as to the justification for the application of strict liability. Standing Committee for the Scrutiny of Bills, op. cit., p. 5.

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This limit on the disclosures to courts and tribunals recognises the potential loss of privacy that would occur in the release of protected ACNC information in an open court and ensures that where it is necessary for information to be provided to a court or tribunal it is done in a manner that is consistent with the Bill. 141

**Clauses 150–30 to 150–50** authorise disclosure of ‘protected ACNC information’ in the following circumstances:

- the disclosure or use is by an ACNC officer in the performance of his or her duties under the ACNC Act
- the disclosure is information on the register and where the information is personal information, the disclosure is necessary to achieve the objects of the ACNC Act
- the disclosure is to an ‘Australian government agency’ to enable or assist the agency to perform or exercise its functions or powers and the disclosure is necessary to achieve the objects of the ACNC Act (when enacted)142
- the disclosure or use of information for a purpose is with the consent of the entity and is disclosed or used for that purpose and
- the information has been lawfully made available to the public and the disclosure is for the purposes of the ACNC Act.

Where ‘protected ACNC information’ is used or disclosed, other than as authorised by the ACNC Act, by an entity who is, or has been, an ACNC officer, the entity commits an offence. The penalty is imprisonment for two years, or 120 penalty units (that is, $13 200), or both: **clause 150–25**. The note to **clause 150–25** clarifies that if the defendant seeks to rely on the matters set out at **clauses 150–30 to 150–50** he or she bears the evidential burden in relation to those matters. The rationale for this is that where a matter is peculiarly within the defendant’s knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence.

Similarly, **clause 150–55** creates an offence where an entity, other than an ACNC officer, acquires protected ACNC information under one of the authorised disclosure provisions outlined above and discloses that information to another entity or uses the information. The penalty is imprisonment for two years, or 120 penalty units (that is, $13 200), or both. **Clauses 150–60 and 150–65** provide exceptions. The note to **clause 150–55** clarifies that if the defendant seeks to rely on the matters set out at **clauses 150–60 and 150–65** he or she bears the evidential burden in relation to those matters.

**Review and appeals**

Part 7–2 of the Bill sets out a two tiered review and appeal mechanism. The Part only applies if a provision of the ACNC Act or the regulations provides that a dissatisfied entity may object to the

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142. Under **clause 300–5**, ‘Australian government agency’ means (a) the Commonwealth, a state or a territory or (b) an authority of the Commonwealth or of a state or a territory.

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decision. The model is based on the Part IVC of the *Taxation Administration Act 1953*. According to the Explanatory Memorandum this approach will:

... ensure that whilst decisions of the ACNC Commissioner will be reviewed independently and separately from the processes in the tax law, the way in which the review and appeal process operate will be familiar to those NFP entities that operated prior to the establishment of the ACNC and were previously endorsed by the Commissioner of Taxation.\footnote{143. Explanatory Memorandum, p. 196.}

The approach also means that decisions of the ACNC Commissioner and the Commissioner of Taxation may be reviewed or appealed together where that is appropriate: clause 170–30.

The first tier is by way of an internal review by the Commissioner and operates as follows:

- the entity must lodge the objection within 60 days (known as the ‘review period’) after the notice of the administrative decision has been served on the entity: subclause 160–10(1)
- the objection must be in the approved form, and state fully and in detail the grounds for the objection: clause 160–5
- the entity may lodge the objection outside of the review period stating the reasons for the failure to lodge the objection within the relevant time limit—but it is up to the Commissioner to decide whether to agree to the late lodgement or to refuse it: subclauses 160–10(2)–(4)
- the Commissioner must disallow the objection or allow the objection in whole or in part —this is known as the ‘objection decision’: clause 160–15
- the Commissioner has 60 days in which to make an ‘objection decision’ and if the Commissioner requires further information, a further 60 days is allowed from the day that the Commissioner receives the information. If the Commissioner has not made a formal decision within that time frame the entity may give the Commissioner a written notice requiring the Commissioner to make an objection decision: subclause 160–20(1)
- if the Commissioner has not made a formal objection decision within 60 days of being given the notice under subclause 160–20(1) the Commissioner is taken to have disallowed the objection: subclause 160–20(3) and
- if the entity is dissatisfied with the ‘objection decision’ it may either apply to the AAT for review of the decision or appeal against the decision to a designated court: clause 160–25.

The second tier is an external process. In relation to a review by the AAT, clauses 165–5 to 165–35 provide that the *Administrative Appeals Tribunal Act 1975* (AAT Act) is deemed to be modified for the purposes of review of objection decisions and extension of time refusal decisions. The prescribed time for making an application for review is within 60 days of the date that the objection decision is served.

**Subclause 165–10(1)** excludes the operation of section 27 of the AAT Act, which allows applications to be brought for review by or on behalf of any person, or persons, whose interests are affected by

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the decision. This means that only the entity that is directly affected by the decision can utilise the right of review to the AAT. According to the Scrutiny of Bills Committee:

The conclusion reached is that any broadening of the right to bring an application would ‘be an inefficient use of government resources, as well as those of the registered entity’ and that indirectly affected persons ‘may not have access to private information’ relevant to the review of decisions. Although it is accepted that these points raise valid concerns, they are stated at a high level of generality which makes it difficult to assess their significance in this particular merits review context.\footnote{Standing Committee for the Scrutiny of Bills, op. cit., p. 7.}

For this reason the Committee has asked the Treasurer for a fuller explanation of the reasons why the default rule about who is entitled to seek review in the AAT is inappropriate.

\textbf{Paragraph 165–40(a) provides} that the applicant is limited to the grounds stated in his, or her, objection to an \textit{‘objection decision’}. This means that the applicant cannot introduce new grounds for consideration during the proceedings. This appears to be contrary to the spirit of paragraph 33(1)(c) of the AAT Act, which provides that the AAT may ‘inform itself on any matter in such manner as it thinks appropriate’.

\textbf{Paragraph 165–40(b) provides} that the applicant bears the onus of proving that the administrative decision should not have been made or should have been made differently. According to the Explanatory Memorandum:

This burden is appropriately placed on the entity making the application as it is consistent with common law principles that the party bringing a law-suit or claiming that another entity’s decision is wrong must prove that this is indeed the case. Further, the facts and evidence relating to these disputes are peculiarly within the knowledge of dissatisfied entities.\footnote{Explanatory Memorandum, p. 201.}

The Scrutiny of Bills Committee refers to this provision as a ‘notable departure from the AAT Act’ on the grounds that

The merits review function of the AAT has been described by the Federal Court as being to make the ‘correct or preferable’ decision. To this extent, the AAT is said [to] put itself in the position of the original decision-maker when conducting its review. For this reason the Courts have resisted placing a formal onus or burden of proof on applicants before the AAT (though it has been recognised that a practical responsibility will often fall on applicants to build a persuasive case in relation to certain matters, particularly where facts or evidence are peculiarly within their knowledge) ... 

Merits review involves administrative decision-making and rules associated with the exercise of judicial powers are not readily transferrable. Where the ACNC Commissioner exercises a

\footnote{Standing Committee for the Scrutiny of Bills, op. cit., p. 7.}
\footnote{Explanatory Memorandum, p. 201.}

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discretionary power it is not clear what is required to prove that the decision is wrong or should have been made differently.\textsuperscript{146}

That being the case, the Committee has sought further information from Treasurer in relation to these matters.

The Commissioner has 60 days from the making of the AAT decision to put the decision into effect:\cite{ch165-45}.

In the alternative, the second tier operates to provide for appeal to a designated court: clauses\textsuperscript{170–25} to \textsuperscript{170–30}.

**Penalties**

Part 7–3 of the Bill creates pecuniary penalties for the making of false and misleading statements and for failing to lodge documents.

\textbf{Clause 175–10} provides that an entity is liable for administrative penalties in circumstances where the entity makes a statement to the Commissioner, to an entity that is exercising powers or performing functions under the ACNC Act or to any other entity where the statement is, or purports to be, one required or permitted by the ACNC Act (when enacted), and the statement is false or misleading in a material particular, whether because of things in it or omitted from it. However, the exception to this general rule is where the entity, and the entity’s agent (if relevant), took reasonable care in connection with the making of the statement: \textbf{subclause 175–10(3)}. Clauses\textsuperscript{175–15} to \textsuperscript{175–30} provide the basis for calculating the amount of the penalty, using a base penalty amount which may be increased or reduced in certain circumstances.

\textsuperscript{146} Standing Committee for the Scrutiny of Bills, op. cit., p. 8.

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The base penalty amount is set having regard to the making of the false or misleading statement as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Penalty Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>The false or misleading statement was made due to the entity’s (or its agent’s) intentional disregard of the ACNC Act (when enacted)</td>
<td>60 penalty units being $6600</td>
</tr>
<tr>
<td>The false or misleading statement was made due to the entity’s (or its agent’s) recklessness as to the operation of the ACNC Act (when enacted)</td>
<td>40 penalty units being $4400</td>
</tr>
<tr>
<td>The false or misleading statement was made due to the entity’s (or its agent’s) failure to take reasonable care to comply with the ACNC Act (when enacted)</td>
<td>20 penalty units being $2200</td>
</tr>
</tbody>
</table>

The base penalty amount will be increased by 20 per cent where, for example, the entity took steps to prevent or obstruct the Commissioner from finding out about the false or misleading nature of the relevant statement: paragraph 175–25(a). Similarly the base penalty amount will be reduced by 20 per cent or even to nil, in circumstances where the entity voluntarily tells the Commissioner, in the approved form, about the false and misleading nature of the relevant statement: clause 175–30.

In addition, clause 175–35 provides that an entity is liable for an administrative penalty for its failure to give a report, return, notice, statement or document to the Commissioner in the approved form where it is required, under the ACNC Act to do so.

The amount of the penalty is calculated under clause 175–40 and varies depending on whether the entity is a small, medium or large registered entity and the length of the period for which the document is due. Importantly, clause 175–65 provides that if any penalty remains unpaid after it is due, the entity is liable to pay interest on that amount. The amount of any penalty and the general interest charge are recoverable by the Commissioner of Taxation as a primary tax debt: clause 175–70.

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147. **Recklessness** is heedless or careless conduct where the person can foresee some probable, or possible, harmful consequence but nevertheless decides to continue with those actions with an indifference to, or disregard of, the consequences. Recklessness implies something less than intent but more than mere negligence. *Butterworths Concise Australian Legal Dictionary*, 3rd edition, LexisNexis Butterworths Australia, 2004, p. 367.

148. **Reasonableness** is the appropriate standard or quality of decision making that must be brought to bear when making an administrative decision. A statutory requirement to act reasonably or on reasonable grounds is satisfied if the decision means an objective standard of reasonableness. Ibid., p. 366.

149. See footnote 114 for the definitions of small, medium and large registered entity.


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Obligations, liabilities and offences

Part 7–4 of the Bill sets out how the ACNC Act applies to entities, including but not limited to, unincorporated associations. According to the New South Wales Court of Appeal:

A corporation has perpetual succession and is liable to sue and be sued. An unincorporated association that is not a partnership is a group of individuals associated together for some lawful purpose other than profit that may or may not have a rigid constitution or a fixed and finite membership. Procedurally, it cannot (at common law) sue or be sued in its own name because, among other reasons, it does not exist as a juridical entity ...

Recognising their inability to sue an unincorporated body ... plaintiffs have proceeded against persons or groups within the body who have assumed some active or managerial role. The persons sued would have acted on behalf of the body as a whole, but this did not confer upon them some species of derivative immunity. If the activity in which they exercised palpable control gave rise to a contractual or tortious claim otherwise recognised by law, they are held liable as principals ...

Nevertheless, care is required to select the members of the committee in office at the relevant time ... Liability remains personal not representative in nature.151

Clauses 180–5 to 180–15 deal with unincorporated associations so that where an obligation is imposed under the Act on an unincorporated association, it is imposed on each individual who was a director of the association at the time the obligation arose. Similarly, where an amount is payable by an unincorporated association, it is payable by each individual who was a director of the association at the time the amount became payable. This is consistent with the comments by the Court of Appeal outlined above.

Clauses 180–20 to 180–25 provide that the liabilities and obligations arising from the ACNC Act in respect of trusts reside with each entity that was a trustee of the trust at the time that the liability or obligation arose; or if one or more of the trustees is a company that is a body corporate, with each individual director of the company at the time that the liability or obligation arose.

Concluding comments

There is substantial evidence of the need for regulatory reform of the NFP sector. Further, it is generally agreed that establishment of a national regulatory authority and national regulatory framework is an essential component of this on-going process of NFP sector reform. As a consequence, and as a result of extensive government consultation with the sector over the Bills and the ACNC, those members of the NFP sector which have engaged in the consultative process are, despite some relatively minor reservations, strongly supportive of the Bills. Should the Bills be


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passed, and the ACNC established, then this should prove a significant step towards a more effective sector. However, the extent to which this will be the case will be heavily dependent upon how effective the Government and the ACNC are in negotiating and facilitating the reduction of unnecessary NFP reporting.
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