Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014

Matthew Thomas
Social Policy Section

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Date introduced: 19 March 2014
House: House of Representatives
Portfolio: Social Services
Commencement: The formal provisions commence on Royal Assent but Schedule 1, with all the operative provisions of the Bill, will only commence when Schedule 1 of the yet to be introduced Australian Charities and Not-for-profits Commission (Repeal) (No. 2) Act 2014 commences.

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 of the Bill

The purpose of the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 (the Bill) is to firstly repeal the Australian Charities and Not-for-profits Commission Act 2012, thereby abolishing the Australian Charities and Not-for-profits Commission, and, secondly, to make some provisions for the transition to a successor agency. The transition to a successor agency will not take place until the enactment of a second Bill, which has not yet been introduced, which details the arrangements that are to replace the ACNC.

Structure of the Bill

The Bill contains one Schedule. Part 1 of the Schedule repeals the Australian Charities and Not-for-profits Commission Act 2012 (the ACNC Act) thereby abolishing the Australian Charities and Not-for-profits Commission (ACNC).

Part 2 of the Schedule enables the Minister to identify a ‘successor agency’ and provides for matters such as the transfer of records and Ombudsman investigations, the protection of certain information provided to the ACNC, and the preparation of the ACNC’s final annual report.

Background

The Coalition signalled its intention to abolish the ACNC at the 2013 federal election in the context of its policy on boosting productivity and reducing regulation.¹ This policy cited the ACNC as an example of ‘excessive red tape across the economy’ that needed to be cut.

Minister Kevin Andrews also flagged in a number of speeches prior to the election the Coalition’s intention to replace the ACNC with another form of regulatory body.²

What is the ACNC?

The ACNC was established as the national independent regulator of charities on 3 December 2012. Under the ACNC Act, the ACNC is to achieve the following three objects:

- maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector
- support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector and
- promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.³

In pursuit of these objects, the ACNC:

- registers organisations as charities where they meet the entitlement criteria and classifies them as sub-types to enable them to access various Commonwealth tax concessions
- provides guidance and education to assist charities to understand and meet their obligations under the ACNC regulatory framework
- publishes and maintains a free and searchable public register which contains details of all qualifying charities and
- works with state and territory governments (along with individual federal, state and territory government agencies) to reduce unnecessary regulation through the development of a ‘report-once, use-often’ reporting framework.⁴

⁴. The register includes: details of where charities are located or operate, who they help, what charitable purpose they have, and names and roles of responsible people. It was also to incorporate financial, audit or review reports in respect of individual financial years. However, the Government intends that the Bill should be passed before charities are required to report in respect of the 2013–14 financial year, in line with its stated commitment to reducing regulatory requirements of the sector.
⁵. See Australian Charities and Not-for-profits Commission (ACNC), ‘ACNC’s role’, ACNC website, accessed 1 May 2014.
Why was the ACNC established?

The ACNC was a long time in the making. For a number of years, many commentators argued that the charities and not-for-profit sector was in need of major reform. A broad consensus developed that there was a need to move from a system in which charities and not-for-profit organisations were regulated in an ad-hoc manner by a variety of regulators to a single, coherent, independent national regulatory system.

Six reviews of the regulation and taxation of Australia’s charities and not-for-profits sector carried out over the last two decades each recommended the establishment of a single, independent national regulator for the sector. It was envisaged that such a body could help to simplify and harmonise regulatory and taxation arrangements for charities and not-for-profit organisations. In doing so, a national regulator could contribute to a reduction in unnecessary regulatory requirements, thereby improving the operation and performance of the sector and increasing its transparency and accountability.

The Rudd-Gillard Government conducted extensive consultation with the charities and not-for-profits sector over the ACNC. It also made substantial changes to the legislation establishing the ACNC in response to sector feedback on the draft Bill.

What has the ACNC done?

An account of the ACNC’s activities during the 15 months or so that it has been operating is provided on the ACNC website and in progress and implementation reports. The following is a brief and general summary of some of the ACNC’s actions in pursuit of its three main objects.

Maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector

The ACNC has registered over 3,000 new charities, with more than 60,000 charities now listed on the Register. Each of the charities listed has met the legal definition of charity and various other requirements outlined under the ACNC Act. All registered charities (except basic religious charities) must meet a set of governance standards in order to maintain ACNC registration. They must keep their information on the register up-to-date, file an Annual Information Statement, and, at the end of the 2013–2014 financial year they are due to provide annual financial information statements to the ACNC. These statements are to vary in the level of reporting required, depending on the charity’s size in terms of revenue.

The rationale behind the register is that it will make charities more transparent and accountable and thereby sustain confidence in the sector. Would-be donors and volunteers are able to search the register to determine whether or not a given charity is legitimate, and to make informed choices about whether or not they wish to give their time and/or money.

The ACNC has also played a more active regulatory role. In its first year of operations the ACNC undertook compliance-related activity in response to 202 complaints. These complaints had to do with governance, fraudulent or criminal activity and private benefit. As at January 2014, the ACNC had 55 cases open, eight of which, it states, involved ‘investigations of serious matters’.

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7. These include the 2010 Productivity Commission report Contribution of the Not-for-Profit Sector, the 2010 Review into Australia’s Future Tax System (Henry Review) and the 2008 Senate Economics Committee report Disclosure regimes for charities and not-for-profit organisations.


10. Australian Charities and Not-for-profits Commission, ‘ACNC Compliance: an overview of the first year of compliance activity’, ACNC website, January 2014, accessed 1 May 2014. Some commentators maintain that the ACNC is failing to pursue with sufficient resolve reported cases of charity wrongdoing. A number of investigators are said to have quit their jobs with the Commission out of frustration at being stymied in carrying out their investigations. The ACNC has denied that investigators have been impeded in carrying out their roles. It has argued instead that ‘some compliance staff, including those with law enforcement backgrounds, found the transition to a civil regulator of charities too much of a change’. R Guillatt, ‘Staff exodus at “flawed” charities regulator’, The Weekend Australian, p. 8, 26 October 2013, accessed 12 May 2014. Teething difficulties aside, Helen Rittelmeyer has observed that to some degree these difficulties are likely to stem from the tension that arises from the dual advisory and enforcement role played by the ACNC. H Rittelmeyer, Independent charities, independent regulators: the future of not-for-profit regulation, The Centre for Independent Studies, no. 143, 6 February 2014, pp. 6–8, accessed 12 May 2014.
Support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector
To assist charities to meet their legal and regulatory obligations (including financial reporting), the ACNC has provided education and guidance materials via its website. ACNC staff have also conducted community education programs and made a number of presentations to this end.

Promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector
The information contained on the ACNC register is to contribute to a Charity Passport. This is a collection of baseline corporate and financial reporting information that is able to be shared by authorised Commonwealth Government agencies, with the goal of reducing reporting duplication for charities. Over time, it is envisaged that the Charity Passport will enable charities to report just once to the ACNC, with the ACNC working towards adoption of the charity passport at the state and territory level.11

To date, two of the jurisdictions—South Australia (SA) and the Australian Capital Territory (ACT)—have aligned their regulatory frameworks for charities with those of the ACNC.12 As such, both the SA and ACT governments have waived their reporting requirements for those charities registered with the ACNC.

Committee consideration

Senate Economics Legislation Committee
The Bill has been referred to the Senate Economics Legislation Committee for inquiry and report by 16 June 2014. Details of the inquiry are at the inquiry homepage.13

Generally speaking, submissions on the Bill have been supportive of the ACNC and its efforts. A number have expressed some disquiet over the lack of clarity regarding the successor agency and regulatory framework that are to replace the ACNC. In the absence of such detail, they observe, it is not possible to make an informed assessment about the impact of the repeal of the ACNC Act.14 Some submissions have called for the Government to conduct a consultation process on what the alternative arrangements should be, prior to the development of the second Bill.15

Policy position of non-government parties/independents

Opposition
Unsurprisingly, the Opposition is opposed to any attempts to do away with the ACNC. Shadow Assistant Treasurer and Shadow Minister for Competition, Andrew Leigh has argued in the Parliament and in the media on a number of occasions that the Government should retain the ACNC.16 In an op-ed piece of 20 March 2014, for example, Leigh insists that the ACNC has helped Australian charities to ‘strengthen their transparency and accountability so the public can have confidence in the sector and the good work it does’.17 He goes on to argue that were the Government to scrap the ACNC this would also involve the abolition of its red tape reduction directorate and thereby undercut the Government’s stated goal of cutting red tape.

Leigh also emphasises that, based on a Pro Bono Australia survey of over 1,500 respondents from the not-for-profit sector conducted in August 2013, a majority of the sector supports the retention of the ACNC. Of

17. A Leigh, ‘Scrap charities register, and say goodbye to giving’, op. cit.
those respondents who expressed an opinion, 81 per cent supported the ACNC as a regulatory system with only six per cent wishing to see the regulation of charities being returned to the ATO.  

In a Ministerial Statement of 19 March 2014, Leader of the Opposition, Bill Shorten expressed his concern that "the Government is proposing to repeal a body that not only has the support of the sector that it regulates but also reduces red tape." In support of his argument that the sector generally supports the ACNC, Shorten cited an open letter to the Government from 54 leaders from the charities sector which praises the ACNC and appeals for its retention. Shorten also referred to the Pro Bono Australia survey mentioned above.

**Greens**

Senator Rachel Siewert has indicated that the Greens intend to oppose the abolition of the ACNC. Arguing in support of the ACNC, Siewert has stated that repealing the body would involve 'handing assessment and regulation of the not-for-profit sector back to the ATO, an organisation which is ill-equipped for the task and lacks important transparency'. Siewert observes that the ACNC is still settling into its role and that both it and the not-for-profit sector reforms it is implementing are 'a work in progress'. She goes on to argue that the Government should work with the sector 'to improve the ACNC, rather than taking the backwards step of destroying it'. Like Leigh, Siewert makes reference to the not-for-profit sector’s general support for the ACNC, arguing 'Tony Abbott and the Coalition are showing deep disrespect to the community sector by trying to repeal the ACNC, despite its broad support'.

**Position of major interest groups**

The Government’s plans to abolish the ACNC have exposed something of a division in the charities and not-for-profits sector. According to a number of reports, the Catholic Church and many Catholic charities have lobbied the Government to get rid of the Commission, while a substantial number of other charities would like to see it retained.

For example, Catholic Education Executive Director, Stephen Elder is reported to have said:

> Catholic schools are already required to meet existing reporting requirements through the federal Department of Education, the Victorian Registration and Qualifications Authority, the state Department of Education and Early Childhood Development, the Australian Taxation Office, the Victorian Institute of Teaching and the Australian Curriculum, Assessment and Reporting Authority My School website. We are highly accountable so we don’t see the value in keeping the ACNC as a regulatory body if it is only adding to the regulatory burden for charities and increased red tape and duplication.

Similarly, Catholic Health Australia CEO Martin Laverty has argued that the ACNC has not realised its promise of reduced reporting for the sector:

> Unfortunately, the legislation setting up the ACNC failed to deliver the much wanted one-stop shop, with organisations now having more reporting obligations than under the previous legislative framework. Charitable associations that once reported to one government now report to two. Setting up a charitable company once

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18. Pro Bono Australia, *2013 Not for Profit Sector Election Survey*, 2013, accessed 8 May 2014. In terms of preferred regulatory system, six per cent of respondents supported self-regulation, six per cent supported regulation by the ATO, 37 per cent supported co-regulation and 44 per cent regulation by the ACNC.


22. Ibid.


required registration with the Australian Securities and Investment Commission (ASIC); now it involves duplicate registration with both ASIC and the ACNC.  

Laverty has expressed doubts that the Federal Government could ever achieve the goal of a one-stop-shop and charities passport, and, given that this is the case, he maintains that the ACNC should be scrapped.

Some other Catholic charities are said to be supportive of a single national regulator, such as the ACNC, but would like for it to be of ‘lighter touch’ in its work.

As noted above, based on the results of a 2013 Pro Bono Australia survey, four out of five charities support the work being done by the ACNC. The CEOs of a number of these charities have written an open letter to the Prime Minister, requesting that the Government keep the ACNC. Among other things, the letter states:

We want to make it very clear to the Commonwealth Government and the wider community that like most charities across Australia, we value the Australian Charities and Not-for-Profits Commission, and we want to see it continue its impressive work...

The launch of the Australian Charities and Not-for-profits Commission in 2012 was a major step forward in creating a regulatory environment that works for the not-for-profit sector rather than against it. In little over one year of operation, the ACNC has built a strong positive reputation by establishing the first public national register of charities, registering more than 2,600 new charities, responding to over 70,000 requests for information from charities and the broader community, investigating and resolving over 200 complaints against charities, and monitoring the extent of red tape and level of public trust and confidence in our charities. The ACNC has done what few new regulators achieve—gained widespread support across the sector it is regulating...

The Australian Government intends to shut down the ACNC as soon as it can, and in the meantime, cut its funding and capacity. It is planning to return the key role of determining charitable status to the Australian Taxation Office, re-creating a conflict of interest. This approach is, at best, an unfortunate policy for charities across Australia and our community. Red tape will continue to grow, the size of the bureaucracy will grow, and services to the sector and the public will be reduced.

The vital work of the ACNC must be maintained, for the benefit of charities, not-for-profits and the many communities they serve.

In a press release of the same day, Minister Andrews responded to the letter as follows:

Today’s open letter from the Community Council for Australia opposing the Government’s plan to abolish the Australian Charities and Not for Profits Commission (ACNC) has been signed by only 54 individuals who are not representative of the more than 600,000 NFPs that make up the sector.

I have had ongoing consultations with major stakeholders and have heard overwhelming evidence that the ACNC needs to go.

The Coalition Government made an election commitment to abolish the ACNC and that is what we will do.

As the regulator of every Australian taxpayer, the Australian Tax Office is more than capable of overseeing the work of charities—it’s been done before, it can do it again.

The New Zealand Government has abolished its regulator and in the U.K. the Charities Commission has been criticised by its National Audit Office as “not regulating charities effectively” and “not delivering value for money”.

The previous Labor government’s Australian Charities and Not-For-Profits Commission increased the red-tape on civil society and made life harder, not easier for the sector.

27. R Millar, op. cit.
We believe that the role of government is to support civil society, not to control it or bind it in more red tape.

I will continue to consult with stakeholders about the establishment of a Centre of Excellence to advocate for the sector, be a leader in innovation and provide education, training and employment opportunities.  

**Financial implications**

As the Explanatory Memorandum notes, the Bill has no direct financial implications that are quantifiable because the Bill ‘does not take effect’ until the second Bill which will detail the replacement arrangements is passed by the Parliament.

**Statement of Compatibility with Human Rights**

The Statement of Compatibility with Human Rights can be found in the Explanatory Memorandum to the Bill. As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible. It does suggest, however, that while this Bill does not in and of itself engage any human right, the subsequent Bill which is to provide the details of the arrangements replacing the ACNC might very well do so.

**Key issues and provisions**

Prior to the establishment of the ACNC, Minister Andrews drew on the political philosophy of liberalism to argue against a charities commission. In general terms, liberalism has it that government activity in civil society effectively crowds out activities that should rightly be the preserve of voluntary associations. State intervention in civil society is held to undermine natural forms of cohesion, civic virtues and individual initiative.

From this perspective, Andrews insisted that the ACNC and its regulatory powers represented ‘an extraordinary reach by government into the affairs of civil society’.  

He argued that there was no evidence of mischief in the charity and not-for-profit sector that could justify ‘a major new regulatory agency with sweeping powers’.  

Instead, he supported the establishment of a small commission with an educative and training function and an advocacy and representational role. This commission would be charged with advancing the third sector and liaising with the sector and governments to develop a new common financial and other reporting standard.

It is clear that the Government is opposed to the ACNC on philosophical grounds. However, the Government has also justified its decision to get rid of the Commission based on the argument that the ACNC has failed to reduce red tape for many charities. The key issue, then, would appear to be the question of whether or not the ACNC could be said to have met one of its main objects.

The Government has committed to do away with the ACNC in order to ‘remove unnecessary regulation and reduce the role of the Government’s oversight of the charity sector’.  

It has defended its stance on the grounds that the ACNC has not become a single reporting point for charities, as was intended, and that the establishment of the ACNC introduced new (and in its view unnecessary) powers in information collection, monitoring and compliance. It insists that the ACNC has imposed additional reporting burdens on the charitable sector.

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29. K Andrews, *ACNC must go to free up red tape*, media release, 19 March 2014. There is certainly evidence that the UK Charity Commission has not, to date, lived up to expectations. However, the New Zealand Charities Commission does not appear to have been abolished on the grounds of under-performance. Rather, official reports suggest that the Commission was disestablished as part of a broader rationalisation of the number of government agencies in New Zealand, and as a means for the New Zealand Government to realise savings. See beehive.govt.nz, ‘Reduction in state agencies confirmed’, 11 August 2011, accessed 1 May 2014. The functions of the Commission (registration, education and monitoring of charities) are now the responsibility of *Charities Services New Zealand* in the Department of Internal Affairs, with an independent board responsible for making decisions about registering or de-registering charities.


31. Ibid.


While this is undoubtedly the case for some charities, others have reported a reduction in their reporting requirements. It might also be argued that the trade-off—a small increase in red tape for various other benefits that the ACNC might bring—could be considered by some charities to be worth it. The concessionary tax treatment that is associated with charitable status should be taken into account when thinking about demands made on charities. Certainly, Renae Barker, Lecturer in Law at the University of Western Australia, has argued that while basic religious charities now have reporting obligations where this was previously not likely to have been the case, this is ‘a small price to pay for the tax benefits and status that come with being a charity’.

Until such time as federal and state and territory government legislation and reporting requirements are harmonised, it is inevitable that the ACNC will result in increased reporting for some charities. The question is, is the ACNC likely to prove successful in negotiating an alignment in reporting requirements for all jurisdictions, and, if so, how long is this process likely to take?

Arguably, it is unreasonable to expect that the ACNC should have made significant inroads at this early stage. As Andreas Ortmann, Professor of Experimental and Behavioural Economics in the UNSW School of Economics observes, ‘it takes time to reduce red tape’ and ‘that the ACNC so far has not reached agreement to eliminate duplicate reporting with NSW and Victoria is hardly surprising given the adversarial politics that have been on display in Australia for years’. In its submission to the Senate Economics Legislation Committee on the Bill, the Queensland Law Society has noted that the ACNC Act has a legislative review period of five years. In its view, this should be considered a reasonable period in which to evaluate the outcomes and achievements of the ACNC, and not the 15 or so months that the Commission has been operating.

Another point worth making is that the harmonisation of reporting for charities is a worthwhile goal and one worth pursuing, whether this be by the ACNC or some alternative body. It is not clear the extent to which the Government intends to continue to seek harmonisation of charity regulation across the jurisdictions, should the ACNC be abolished. In a policy address to the Menzies Research Centre of 15 June 2012, Minister Andrews stated that, were it to gain office, the Coalition would ‘respect the role of the states, but work with them to achieve harmony in relation to fundraising codes and other regulations’. It is to be assumed that this task will fall to the Government’s proposed alternative to the ACNC, the National Centre for Excellence. If so, then it is an open question whether such a body, with relatively limited powers, would be more likely to realise this goal than the ACNC, especially given that reducing red tape is one of the ACNC’s explicit legislative objects.

37 A Ortmann, ‘Should the Government keep the ACNC? And if not, what should it put in its stead?’, Core Economics, 1 March 2014, accessed 1 May 2014.
39 In his submission to the Senate Economics Legislation Committee on the Bill, Dr Ted Flack has expressed the view that while a return to previous regulatory arrangements may reduce red-tape for some charities in the immediate term, it does not address the many problems with charity and not-for-profit regulation that underpinned the decision to establish the ACNC: ‘simply removing the ACNC and returning to the position before the establishment of the ACNC would not solve the problem highlighted by several authoritative and politically impartial national inquiries held since 1995. Abolition would reduce the temporary additional burdens imposed by the ACNC, but abolition does not solve the underlying problem that the ACNC was in part designed to solve. If it is the government’s judgement that the establishment of the ACNC has not proven to be the best mechanism to achieve the red-tape reductions, then alternative mechanisms must be found. Simply going back to the status quo before the ACNC does not achieve that end [reducing red-tape burden on charities generated by state and territory regulators] unless there are alternative drivers of reform’. T Flack, Submission to the Parliament of Australia Senate Economics Legislation Committee on the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014, Australian Parliament website, 8 April 2014, p. 2, accessed 8 May 2014.
41 The ACNC Act provides at section 15-5 that ‘(1) The objects of this Act are: (a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and (b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and (c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector’.
In arguing against the establishment of the ACNC, Minister Andrews suggested that the Rudd-Gillard Government had not made a case for strengthened regulatory powers in order to protect and enhance public trust and confidence in the charities sector.\(^{42}\)

Trust in the sector is indeed high. In 2013 research consultants ChantLink conducted research into community trust and confidence in the charities sector and a range of other organisations on behalf of the ACNC. It was found that charities ranked third among all those organisations assessed in terms of levels of trust. Charities gained a mean score of 6.6, after doctors with a mean score 7.1 and police with a mean score of 7.0. The research also found that when respondents were made aware of the ACNC and its role, this significantly increased their level of trust in charities, to a mean score of 7.0.\(^{43}\)

Nevertheless, there are some indications that the Australian public would like to see greater levels of transparency and accountability in the charitable sector where it comes to fundraising activities.\(^{44}\) This could help to explain why, according to the above research, trust and confidence in charities was enhanced when respondents were made aware of the ACNC. At the very least, the ACNC register provides members of the public with a means for determining whether or not an organisation soliciting funds is in fact a charity.

With regard to the compliance activities conducted by the ACNC thus far, Ortmann argues ‘it is simply too early to say whether the ACNC is able to ferret out fraud and various forms of misconduct’.\(^ {45}\) It is also not possible to quantify any deterrent effects that the ACNC may have had. That said, Ortmann goes on to suggest that ‘simply by harmonising reporting standards and collecting facts about the lay of the not-for-profit landscape’ (via the Register) the ACNC could go some way towards improving charities’ transparency and accountability.\(^ {46}\)

It is currently very difficult for members of the public to obtain financial information about many charities, despite their clearly wanting greater access to such information. Under the ACNC, financial information is to be made available via the Register from July 2014. Should the ACNC be abolished and regulatory powers over charities be returned to the ATO and ASIC, there is no guarantee that such information will be made available via the successor agency, or at least not for all charities.

### What is to replace the ACNC?

The Government has stated that it intends to ‘work with and support the sector to self-manage’.\(^ {47}\) To this end, it will establish a National Centre for Excellence and return to the ATO and ASIC those regulatory functions that were their responsibility prior to the establishment of the ACNC.\(^ {48}\)

As noted above, there is very little support in the sector for regulation by the ATO. One of the main reasons for this is that there is arguably a conflict of interest associated with the ATO being responsible for revenue raising while at the same time making decisions on whether or not an entity should be granted charitable status. In the context of the 2001 Inquiry into the Definition of Charities and Related Organisations, the ATO itself argued that

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44. For example, judging by *Choice Magazine’s 2008 Survey of Charities* many Australians (94 per cent of 240 respondents to Choice’s survey) would like to have information on what proportion of their donation actually reaches their charity’s intended beneficiaries. 97 per cent of Choice’s survey respondents also thought it was ‘very’ or ‘somewhat’ important that they should be provided with information about the effectiveness of charities’ work—that is, whether they are achieving their stated mission and objectives. (Of course, it is not only through donations that the Australian community provides support to charities. Charities also receive significant financial support by means of various tax exemptions and benefits.) In the interests of improving transparency and disclosure for donors, as well as reducing the regulations and reporting requirements that charities must comply with in different states and territories, Choice recommended the introduction of a single regulator for the charity and not-for-profit sector.

45. A Ortmann, op. cit.

46. Ibid.


48. In its submission to the Senate Economics Legislation Committee on the Bill, the Australian Women’s Health Network has observed that the sector already has access to a centre of excellence-like institution in the Queensland University of Technology’s Centre for Philanthropic and Nonprofit Studies. Australian Women’s Health Network, *Submission to the Parliament of Australia Senate Economics Legislation Committee on the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014*, Australian Parliament website, April 2014, p. 4, accessed 8 May 2014.
it was inappropriate for it to be responsible for determining charitable status. The ATO supported the view that such decisions should be made by an independent body.49

Following its extensive review of the charities and not-for-profits sector, the Productivity Commission determined that responsibility for endorsement for Commonwealth tax concessional status for not-for-profit organisations should fall to the independent regulator that it recommended should be established.50

As set out above, it is assumed that details of the functions to be performed by the proposed National Centre for Excellence, and the precise allocation of responsibilities to the ATO and ASIC will be spelled out in the second Bill which is to contain ‘the substance of replacement arrangements’.51

What the current Bill does is much more circumscribed – it allows the Minister to nominate a successor agency (to be specified in a determination under subitem 3(2) of the Bill), which will become responsible for the ACNC’s records (item 4), interacting with the Ombudsman on any ongoing investigations (item 5), and preparing the final annual report on the ACNC’s operations (item 7). It is not clear why the Bill only sets out arrangements for transfer of investigations by the Ombudsman, and not any other agency which could be dealing with complaints about the ACNC or examining its performance, such as the Australian National Audit Office or the Australian Human Rights Commission. It is possible that these matters will be dealt with in the second Bill.

Division 150 of the ACNC Act protects confidential and personal information provided to the ACNC. It does this by providing, for example, that an ACNC officer who discloses or uses protected information for an unauthorised reason is guilty of an offence punishable by up to two years imprisonment and/or a $20,400 fine (section 150-25 of the ACNC Act). Item 6 provides that a person who was subject to Division 150 of the ACNC Act at the time that it is repealed, will continue to be subject to it after that time. This means that people who are, or have been, ACNC officers at the time the ACNC is dissolved will be able to be prosecuted should they disclose protected information obtained in the course of their duties with the ACNC.

The Queensland Law Society is highly critical of the two stage legislative process that has been adopted to abolish the ACNC and replace it with an alternative body. It has argued that the process:

• runs counter to the Government’s intention to reduce obsolete legislation on the statute books
• creates uncertainty among charities ‘as to their future obligations to and reporting requirements for the Commonwealth government’
• makes good administration by the ACNC extremely difficult and
• renders informed debate on the Bill ‘effectively impossible as many of the issues necessarily raised cannot be considered in isolation and cannot be adequately addressed without analysing the No. 2 Bill’.52

Proposed alternative model of regulation

Minister Andrews is reported as having stated that one of the National Centre for Excellence’s functions will be to:

... set up a website, which is voluntarily subscribed to by organisations, but there is a very detailed checklist for an organisation to get a tick. A bit like a quality assurance model that is operated within the private sector rather than government itself.53

This provides an indication that Andrews sees merit in some sort of national register of charities, similar to that maintained by the ACNC.

In keeping with the Government’s stated commitment to light touch regulation of the sector, Minister Andrews has indicated that the Government is considering adopting a charity evaluator model similar to the US-based Charity Navigator. This is a not-for-profit run service that provides free ratings of the finances, transparency and

accountability of charities. It is one of a number of similar services in the US that rate the efficiency and effectiveness of charities in fulfilling their purpose as a means to assist would-be donors in making charitable giving decisions. Besides Charity Navigator, perhaps the most prominent and influential of the charity ratings are GuideStar, CharityWatch, BBB Wise Giving Alliance and Give Well.

While each of these ratings differs in terms of the methodology used, they all examine charities’ finances in order to determine how much of their budget goes towards administrative and fundraising expenses and how much goes towards programs themselves. This analysis of cost effectiveness is frequently referred to as the overhead ratio. Each of the ratings also considers to varying degrees the accountability and transparency of charities—that is, primarily whether or not they make available basic financial information and documents (such as annual reports, budgets, audit reports etc.). Some of the ratings help to guide donors by grading charities, while others simply provide their analyses of the charities as a means to assist donors in making informed judgements about those that they wish to support.

A number of criticisms have been levelled at charity rating services by experts in the philanthropy field. Arguably, the most significant of these are that ‘they rely too heavily on simple analysis and ratios derived from poor-quality financial data; they overemphasise financial efficiency while ignoring the question of program effectiveness; and they generally do a poor job of conducting analysis in important qualitative areas such as management strength, governance quality, or organisational transparency’.\(^54\)

There are two main points worth making with regard to the first of these criticisms. Firstly, it is perhaps not surprising that the financial data on which a number of charities ratings services rely is frequently poor quality.

In the US, individual states have constitutional responsibility with regard to the regulation of charities and other not-for-profit organisations. Hence, there is a complex regime of state laws for the regulation of incorporated not-for-profit organisations, and the states may have their own specific requirements for charities.

In terms of federal requirements, the main demands are those made by the Internal Revenue Service (IRS).\(^55\)

The IRS demands that every organisation that is exempt from federal income tax under Internal Revenue Code section 501(a), and that reaches a threshold income or asset level (annual gross receipts from sources within the US of $50,000 or more), report on their operations through the annual lodgement of Form 990.\(^56\)

However, while many charities would be required to fill out Form 990s, large scale evaluations of these forms have found that they vary tremendously in quality. Indeed, there are serious and widespread concerns about the accuracy and the reliability of Form 990 data. Hence, any charity rating service that relies solely or too heavily on Form 990 data is bound to produce highly questionable ratings; as the old adage goes, garbage in, garbage out.\(^57\)

The second point to be made is that concentrating on the overhead ratio as a means to judge a charity’s quality or worthiness as a recipient of donations has been found to have had unintended consequences. According to the editors of the NonProfit Quarterly, in order to ensure high ratings on this criterion ‘organisations have starved themselves of necessary infrastructure in a misguided attempt to fit a single formula. What’s worse, many nonprofits feel that they have to fudge their numbers to fit, which means obfuscating the real information about how much it costs to serve a variety of organisational needs across size, stage of development and field. This is valuable information for comparative purposes, and it’s being obscured’.\(^58\)

It is clearly important that charities should be able to keep their overhead expenditures and administrative costs to a reasonable level. However, the argument of many critics of charity rating systems is that this should not be used as an isolated one-size-fits-all measurement of a charity’s worthiness. Some charities will be in a better

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55. Charities in the US may be required to file certain returns and reports and make disclosures in addition to the Form 990 annual return requirements.
56. Charities are required to provide on an annual basis a statement of financial position, a statement of activities, and a statement of cash flows. Organisations are obliged to: report total assets, liabilities and net assets in a statement of financial position; report the change in net assets in a statement of activities; and report the change in cash and cash equivalents in a statement of cash flows.
57. Some charity rating services do not simply rely on Form 990s but develop their financial health ratios based also on a charity’s audited financial statements.
position than others to keep their costs down, but this does not necessarily mean that they are delivering a better service on the ground. Hence, as noted above, in the critics’ view, there is a need to focus on the question of program effectiveness as well as financial efficiency. In short, it is argued that there need to be more robust, more revealing measures of charities’ quality.

As Lowell, Trelstad and Meehan see it, a truly effective ratings system would have at least four main components:

- improved financial data that is reviewed over three to five years and put in the context of narrowly defined peer cohorts; qualitative evaluation of the organisation’s intangibles in areas like brand, management quality, governance, and transparency; some review of the organisation’s program effectiveness, including both qualitative critique by objective experts in the field, and, where appropriate, ‘customer’ feedback from either the donor or the aid recipient’s perspective; and an opportunity for comment or response by the organisation being rated.

Obviously, the conduct of such detailed and sophisticated research and analysis would be very resource intensive, and herein lies another problem. Few individual organisations could afford the time and cost involved with such an approach to ratings.

As noted above, Minister Andrews has indicated that he intends for the National Centre for Excellence to establish a quality assurance website to which charities could voluntarily subscribe. It is to be assumed that this would serve as the basis for any conduct of ratings that was to take place. However, given that subscription to the website would be voluntary, and the checklist ‘very detailed’, it is not clear just how many charities would subscribe to it, and thus how useful it would be. In any case, some might question the merit of leaving accountability and transparency as a choice to charities that ‘might well have a vested interest not to be accountable and transparent’.

**Concluding comments**

The ACNC was established based on the recommendations of a number of reviews of the charities and not-for-profits sector and its regulation. The Commission would appear to have gained the support of a substantial proportion of the sector. This is despite the fact that it could not be said to have realised, as yet, what is arguably its main object; that is, reducing unnecessary regulatory obligations for a majority of charities. Given the complexity and magnitude of this task, however, it is unreasonable to assume that the ACNC should have achieved what amounts to the Holy Grail of charity and not-for-profit sector regulation—that is, a sole point for registration and reporting.

The Government plans to return to the ATO and ASIC their former regulatory responsibilities for charities and not-for-profit organisations. It also intends to establish a National Centre for Excellence, whose precise role and parameters have yet to be determined. As such, it is not entirely clear what the proposed replacement regulatory framework for charities and not-for-profits would look like.

While it seems clear that there is some room for improvement in the ACNC and its operations, arguably this is to be expected given the novelty of the institution and that it has not had long to develop its practice. The question is, would it be better to retain and refine the ACNC, which would seem to have the support of much of the sector that it regulates, or to institute a new regulatory framework that may not necessarily improve matters, and could potentially make them less transparent and more complex?

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59. S Lowell, B Trelstad and B Meehan, op. cit.
60. A Ortmann, op. cit.