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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION BILL 2012  
AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION  
(CONSEQUENTIAL AND TRANSITIONAL) BILL 2012

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EXPLANATORY MEMORANDUM

(Circulated by the authority of the  
Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP)



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## ***Table of contents***

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Glossary .....	1
General outline and financial impact.....	3
Chapter 1      Background.....	7
Chapter 2      Constitutional basis for the Bill .....	23
Chapter 3      Registration.....	29
Chapter 4      Australian Charities and Not-for-profits Register .....	51
Chapter 5      Governance standards and external conduct standards .....	57
Chapter 6      Reporting and record keeping.....	69
Chapter 7      Duty to notify .....	87
Chapter 8      Information gathering and monitoring powers .....	95
Chapter 9      Education, compliance and enforcement .....	117
Chapter 10     The Commission and the Advisory Board .....	163
Chapter 11     Secrecy framework .....	177
Chapter 12     Reviews and appeals .....	195
Chapter 13     Miscellaneous .....	211
Chapter 14     Transitional provisions .....	239
Chapter 15     Consequential amendments.....	253



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## ***Glossary***

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
AASB	Australian Accounting Standards Board
AAT	Administrative Appeals Tribunal
ABN	Australian Business Number
ACCC	Australian Competition and Consumer Commission
ACN Register	Australian Charities Not-for-profits Register
ACNC	Australian Charities and Not-for-profits Commission
AFTS	Australia's Future Tax System
ANA	Australian NFP Administrator
ASIC	Australian Securities and Investments Commission
APRA	Australian Prudential Regulation Authority
APS	Australian Public Service
ATO	Australian Taxation Office
CCC	Charities Consultative Committee
CCF	Clubs Consultative Forum
COAG	Council of Australian Governments
DGR	Deductible gift recipient
FATF	Financial Action Task Force
FBTAA	<i>Fringe Benefits Tax Assessment Act 1986</i>
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FRE	Federally regulated entity
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
ITSA	Insolvency and Trustee Service Australia

TEQSA	Tertiary Education Quality and Standards Agency
MOU	Memorandum of understanding
NFP	Not-for-profit
PBIs	Public benevolent institutions
PC Report	Productivity Commission's Report on the <i>Contribution of the Not-for-profit Sector 2010</i>
RIS	Regulatory Impact Statement
SES	Senior Executive Service
Special Account	Australian Charities and Not-for-profits Commission Special Account
SR VIII	Special Recommendation VIII

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## ***General outline and financial impact***

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### **Australian Charities and Not-for-profits Commission**

The Australian Charities and Not-for-profits Commission Bill 2012 establishes a new independent statutory office, the Australian Charities and Not-for-profits Commission (ACNC) which will be the Commonwealth level regulator for the not-for-profit (NFP) sector. The exposure draft also establishes a new regulatory framework for the NFP sector.

***Date of effect:*** The ACNC will commence operations on 1 October 2012.

***Proposal announced:*** This reform was announced by the then Assistant Treasurer and Minister for Financial Services and Superannuation and the then Minister for Human Services and Social Inclusion's joint Media Release No. 77 of 10 May 2011.

***Financial impact:*** Establishing the ACNC and the resulting structural changes to the Australian Taxation Office (ATO) has resulted in the following fiscal impact:

	<b><i>2011-12</i></b>	<b><i>2012-13</i></b>	<b><i>2013-14</i></b>	<b><i>2014-15</i></b>
Expense	\$8.6m	\$14.8m	\$10.0m	\$10.1m
Revenue	\$8.0m	\$10.0m	\$10.0m	\$13.0m
Capital	\$1.0m	\$9.1m	-	-

***Human rights implications:*** This Bill does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 17, paragraphs 17.1 to 17.41.

***Compliance cost impact:*** The establishment of the ACNC and related regulatory framework could result in minor transitional compliance costs for the registered charities that will come within the scope of the ACNC. However, the introduction of a streamlined regulatory framework for the NFP sector, which includes a 'report-once, use-often' reporting framework, is expected to reduce compliance costs over the medium to long term.

## **Summary of regulation impact statement**

### **Regulation impact on business**

**Impact:** Registered charities that will come within the scope of the ACNC could experience transitional compliance costs.

Once the sector's new regulatory system is in place, the Regulatory Impact Statement finds that it will lead to a reduction in compliance costs and red tape faced by the sector. Small entities that currently have no reporting obligations are a minor exception. These entities would be required to report to the ACNC and may therefore experience a minor increase in compliance burden. However, they may benefit through other aspects, such as more easily accessing Commonwealth exemptions, concessions and benefits, and by having additional public exposure through a page on the ACNC website at no cost.

**Main points:**

- The ACNC Bill establishes a new regulatory framework for the sector and creates the ACNC as the Commonwealth level regulator responsible for administering the ACNC Bill.
- The sector's new regulatory system will establish:
  - a robust and streamlined regulatory framework for the NFP sector, including a 'report-once, use-often' reporting framework;
  - strengthen the sector's transparency, governance and accountability; and
  - provide the public with information on the sector commensurate to the level of support provided to the sector by the public.
- The ACNC will create a 'one-stop shop' for ACNC registration, tax concessions, and accessing Australian Government services and concessions. Registered entities that are involved in a range of activities would only have to apply and report to the ACNC.
- The move to the 'report-once, use-often' approach would reduce the compliance burden associated with duplicative, ad hoc and inconsistent reporting.



- Smaller entities with no reporting obligations may have to provide some basic reports, with the level of reporting based on the entity's annual revenue turnover. This reporting requirement may introduce a minor compliance burden for these small entities.
- The compliance savings from introducing the ACNC and a new regulatory framework are hard to quantify, particularly for this sector, due to limited data availability.
- During consultation with the sector stakeholders indicated that a move toward a 'report-once, use-often' approach would lead to 'huge' savings in administrative and compliance costs.
- The Regulatory Impact Statement also finds that a truly national NFP regulator would provide the greatest benefits in terms of reducing regulatory overlap, red tape and compliance costs for the sector.



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# **Chapter 1**

## **Background**

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### **Outline of chapter**

1.1 This Chapter explains the background to the Australian Charities and Not-for-profits Commission Bill 2012 (Bill) and the context for reform.

1.2 The Bill establishes a national regulator, and a national regulatory framework for the not-for-profit (NFP) sector.

1.3 Initially, only tax endorsed charities will be regulated by the Australian Charities and Not-for-profits Commission (ACNC). However, the Bill establishes a regulatory framework that can be extended to all NFP entities in the future.

1.4 The Bill:

- establishes the ACNC;
- charges the ACNC with registering NFP entities (initially charities) and maintaining a register;
- provides for the powers of the ACNC Commissioner in relation to the regulation of registered entities; and
- sets out the obligations and responsibilities of registered entities.

### **Context of reform**

#### **The not-for-profit sector**

1.5 The NFP sector broadly consists of entities that seek to achieve a community, altruistic or philanthropic purpose.

1.6 The NFP sector is diverse, with entities ranging from micro-sized sporting and recreational clubs to large national and multinational charitable organisations.

1.7 NFP entities play a unique role in Australian society. In recognition of this important role, NFP entities are exempted from a range of regulatory requirements and are funded by governments, both directly and through tax concessions, and by donations from members of the public.

1.8 NFP entities differ from other entity types which may be accountable to their members or stakeholders. NFP entities also need to be accountable to the public, including donors, members and volunteers.

1.9 Maintaining, protecting and enhancing public trust and confidence in the sector is essential to its ongoing sustainability, including the ability to provide the services that it delivers to the public.

1.10 A national regulatory system that promotes good governance, accountability and transparency for NFP entities will help to maintain, protect and enhance the public trust and confidence that underpins the sector.

1.11 The ACNC will play a key role in providing information and education to the public about the NFP sector. The educational role of the ACNC will help to improve public understanding of, and engagement with, the important work of the sector.

1.12 The ACNC will administer a new system of smarter regulation. The regulation will be proportional to size and risk in order to minimise regulatory duplication and compliance costs, and to allow registered entities to focus on achieving their mission.

1.13 The ACNC will prioritise working with other regulators to minimise regulatory requirements for the NFP sector wherever possible.

1.14 The establishment of a regulatory framework that reflects the unique structures, funding arrangements and goals of NFP entities will support and sustain a robust, vibrant, independent and innovative Australian NFP sector.

### **Outline of existing regulatory arrangements**

1.15 Currently, no single institution is responsible for the regulation of the NFP sector.

1.16 At present, Commonwealth, State, Territory and local governments regulate different parts of the NFP sector for both different and overlapping purposes. For example, these laws provide tax concessions, exemptions from registration and permit requirements,

exemptions or limitations on legal liability, and impose fundraising and lottery regulations.

1.17 At the Commonwealth level, regulation is undertaken to access Commonwealth taxation concessions and in relation to certain entity types, such as companies limited by guarantee, Indigenous corporations, and some corporate trustees.

1.18 In the absence of a registration regime, the role of de facto regulator for the NFP sector at the Commonwealth level has generally been shared between the Australian Taxation Office (ATO) and the Australian Securities and Investments Commission (ASIC).

1.19 The ATO acts as a regulator for NFPs that access tax concessions including an income tax exemption, deductible gift recipient (DGR) status, refundable franking credits, and fringe benefits tax (FBT) and goods and services tax (GST) concessions.

1.20 The current law requires charities to be endorsed by the ATO before they can access NFP tax concessions. Hence, the ATO, by default, is also responsible for determining charitable status.

1.21 Currently, the ATO's endorsement process requires applicants to provide information on eligibility for tax concessions, including operational and governance frameworks, and financial position.

1.22 NFP entities other than charities are generally able to self-assess their access to income tax concessions, and are therefore not regulated by any agency in an ongoing manner.

1.23 There are approximately 600,000 entities in the NFP sector, of which it is estimated around 400,000 may access Commonwealth tax concessions, either through the ATO endorsement process or by self-assessment.

1.24 ASIC has a smaller role in the regulation of the NFP sector at the Commonwealth level.

1.25 ASIC is currently responsible for regulating approximately 11,000 NFP entities incorporated as companies limited by guarantee under the *Corporations Act 2001*. ASIC also regulates professional trustee companies as well as some charities which are incorporated as other types of companies under the *Corporations Act 2001*.

1.26 ASIC also has responsibility for the registration of incorporated associations and cooperatives if they wish to operate outside their home jurisdiction.

1.27 The Office of the Registrar of Indigenous Corporations (ORIC) is an independent statutory office that regulates NFP Indigenous corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

1.28 The States and Territories regulate incorporated associations and charitable trusts (although public and private ancillary funds are regulated at the Commonwealth level), as well as fundraising activities, and impose reporting and governance requirements on entities that receive State and Territory government funding.

1.29 Current reporting requirements across the sector are inconsistent; there is minimal reporting for some organisations and complex and burdensome reporting for others. There is also no single reference point for the NFP sector to access information, education or guidance.

1.30 There is limited easily-accessible information available to the public on the activities of NFP entities. The current lack of information available to the public acts as a barrier to the optimal allocation of resources, thus undermining philanthropic engagement and potentially weakening the generosity of donors.

## **History**

### **Reviews and Inquiries**

1.31 There have been several reviews into the regulation and taxation of the NFP sector in Australia over the last 17 years.

1.32 A consistent theme that emerged from these reviews is that the regulation of the NFP sector would be significantly improved by establishing a national regulator and harmonising and simplifying regulatory and taxation arrangements.

1.33 The 1995 Industry Commission Inquiry Report, *Charitable Organisations in Australia*, recommended a sector wide focus on best practice to strengthen the contribution the charitable sector makes to Australian society.

1.34 The 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations* recommended that establishing a comprehensive national administrative framework for the charitable and related sector and an independent administrative body for charities and related entities, be considered.

1.35 The 2008 Senate Economics Committee *Inquiry into Disclosure Regimes for Charities and Not-for-profit Organisations* recommended the establishment of a single independent national regulator for NFP organisations. The Committee recommended a broad role for the regulator, including registering NFP organisations, educating the sector and encouraging compliance and developing and maintaining an accessible, searchable public information portal.

1.36 The 2010 *Review into Australia's Future Tax System* (The 2010 AFTS Review) recommended that a national charities commission should be established to monitor, regulate and provide advice to all NFP organisations.

1.37 The 2010 Productivity Commission *Report on the Contribution of the Not-for-profit Sector* (2010 PC Report), recommended the establishment of a 'one-stop shop' for Commonwealth regulation by consolidating various regulatory functions into a new national registrar. The report recommended that the regulator undertake a variety of functions, including assessing organisations for Commonwealth tax concession status, providing a single reporting portal for corporate and financial information, and investigating compliance with regulatory requirements.

1.38 The 2010 Senate Economic Legislation Committee in its *Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010* recommended the establishment of a single independent national commission for NFP organisations.

### ***Scoping study for a national regulator***

1.39 A scoping study for a national NFP regulator was undertaken to determine the role, functions, feasibility and design options for a 'one-stop shop' NFP regulator.

1.40 The Government released a consultation paper in January 2011 to ascertain the views of the NFP sector on the goals of national regulation, the scope of national regulation and the functions and form of a national regulator. The consultation process demonstrated significant support for a national regulator and national regulation, and for NFP reform to be undertaken as a matter of priority.

1.41 The *Final Report on the Scoping Study for a National Not-for-profit Regulator* (Final Report), produced by the Treasury, presented the findings of the scoping study and provided a blueprint for implementing a national NFP regulator.

1.42 The Final Report recommended that a single regulator should be established for the purposes of governance, accountability and transparency of NFPs and that the regulator should, as far as possible, be responsible for regulating all NFPs.

1.43 The report also recommended that the regulator should administer a principles-based regulatory framework to apply broadly across the NFP sector, although regulation should be proportional and tailored to address the specific needs and size of NFPs.

## **Budget announcement**

1.44 As part of the 2011-12 Budget, the Government announced the first stage of an ambitious reform agenda for the NFP sector.

1.45 To progress its NFP reform agenda, the Government announced that it would:

- establish the ACNC as a ‘one-stop shop’ regulator for the NFP sector;
- introduce a statutory definition of ‘charity’;
- introduce a general reporting framework and the establishment of a public information portal;
- better target NFP tax concessions to ensure they are targeted only at those activities that directly further an NFP’s altruistic purposes; and
- undertake a number of further reviews into the sector.

1.46 The Government further announced that the ACNC would:

- be headed by an independent statutory office holder, the Australian Charities and Not-for-profits Commission Commissioner (ACNC Commissioner);
- administer a regulatory framework to simplify the NFP sector’s interactions with the Australian government;
- initially be responsible for determining the legal status of entities seeking charitable status, including public benevolent institution (PBI) status, on behalf of all Commonwealth agencies;



- maintain a register of registered entities and, through its website, provide an information portal which will act as the central reference point for information about and for the NFP sector;
- provide NFPs (particularly small and newly established NFPs) with a first point of call for accessing information and educational materials to answer questions through its website;
- administer a single Commonwealth governance and regulatory framework for NFPs; and
- administer a ‘report-once, use-often’ general reporting framework, to simplify reporting arrangements for registered entities.

1.47 The Government also announced the establishment of an Advisory Board of NFP sector experts to provide advice to the ACNC Commissioner.

1.48 In the long term, the role of the ACNC will expand to include responsibility for the regulation of all NFP entities which access tax concessions or other Australian government benefits, regardless of their legal form.

1.49 The ACNC may also take additional roles in the future pending the outcome of any reviews into the NFP sector.

1.50 To take this into account, this Bill, which establishes the ACNC, makes provision for additions to its regulatory responsibilities over time.

1.51 The Explanatory Materials uses the term NFP when general reference is made to the sector and in expectation of the future expansion of the regulatory responsibilities of the ACNC, although the application of the Bill is currently limited to charities.

## **Benefits of reform**

1.52 The Government’s NFP reform agenda will implement the most significant reforms the sector has experienced over the last century.

1.53 The reforms recognise the vital services and benefits that the NFP sector provides to communities throughout Australia.

1.54 These reforms take into consideration the matters outlined in the Final Report, and the recommendations of the 2010 Productivity Commission Report and the 2010 AFTS Review.

1.55 As stated in the Final Report the current ad hoc approach has resulted in ‘significant disadvantages in having multiple regulators of the NFP sector. Specifically, it results in complex, overlapping and duplicative regulation, and a lack of transparency, making it difficult for the public to understand the NFP sector. Ultimately it leads to an unnecessarily high regulatory burden for NFPs’.

1.56 The establishment of a regulatory system for NFP entities will provide significant benefits to the NFP sector by:

- reducing red tape through processes to avoid or minimise duplication where possible;
- improving public engagement with the NFP sector through a public information portal;
- providing the sector with better protection from possible breaches of trust and confidence by a few;
- offering information to help the public understand the work of the sector; and
- providing information and guidance to the sector to assist registered entities to comply with their regulatory obligations and to fulfil their diverse and important goals.

## **Staged approach to reform**

1.57 NFP entities generally operate for the broad public benefit, and are relied on by many Australians, often by the most vulnerable in our community.

1.58 NFP entities play a unique role in Australia for which they are given funding from governments, both directly and indirectly, and from donations from members of the public. This unique and important role means that governments often afford them exemptions, concessions and benefits under a range of laws and fee structures.

1.59 The Government announced on 17 May 2012 that the financial reporting framework and governance standards, including the external conduct standards, will commence on 1 July 2013.

1.60 The Government will consult on the content of financial reports and the governance and external conduct standards, including with key stakeholders and advisory bodies such as the NFP Sector Reform Council and the public more broadly.

1.61 The two-staged approach means that the financial reporting requirements and governance standards for registered charities will not come into effect until 1 July 2013. The extended start dates will give more time for charities to transition to the new regulatory framework and for the ACNC to provide guidance materials to help with the transition. The first financial reports will not need to be lodged with the ACNC until 31 December 2014.

## Consultation

1.62 The Government has undertaken extensive consultation on the ACNC legislation and the establishment of the ACNC. These consultation processes build upon the findings of past reviews and inquiries, as discussed earlier in this chapter.

1.63 The consultation process included a consultation paper on the *Scoping Study for a National NFP Regulator*, which was released on 21 January 2011. Consultation on the paper closed on 25 February 2011, and over 160 submissions were received from stakeholders.

1.64 An exposure draft of legislation to establish the ACNC, along with related explanatory materials, was released on 9 December 2011 following almost a year of detailed consultations and discussions. Consultations on the exposure draft closed on 27 January 2012.

1.65 A wide range of stakeholders participated in the consultation process, including NFP entities, academics, accounting and legal experts, and representatives of States and Territories.

1.66 The Government also consulted with peak advisory bodies, such as the NFP Sector Reform Council, the Charities Consultative Committee, and the Clubs Consultative Forum.

1.67 The Government has taken these comments into consideration in developing the draft legislation.

1.68 In addition, the Government undertook targeted consultation on the draft legislation in May 2012 with a wide range of NFP representatives including the Charities Consultative Committee, the Clubs

Consultative Forum, the NFP Sector Reform Council, NFP sector experts and representatives of the States and Territories.

1.69 A series of ACNC Implementation Taskforce community consultation sessions were held in all Australian capital cities and Townsville, and concluded in February 2012. These sessions were attended by around 1,600 people, and provided an opportunity for stakeholders to provide comments and seek clarity over various aspects of the reform.

1.70 The Government referred a draft version of the ACNC Bill to the House of Representatives Standing Committee on Economics for an inquiry over the Winter 2012 Parliamentary recess.

1.71 The Treasury made an initial submission to the House of Representatives Committee, and also made an additional submission following the Committee Hearing process.

1.72 The Committee's comments, as well as issues raised during the inquiry process, have been taken into consideration in the final preparation of the Bill and this Explanatory Memorandum.

### **The ACNC Commissioner's functions under the Bill**

1.73 The ACNC Commissioner has the general administration of the Australian Charities and Not-for-profits Commission Bill 2012. The ACNC Commissioner therefore has all the rights, powers, responsibilities and obligations provided to the administrator of such laws under statute and common law.

1.74 As such, the ACNC Commissioner's role will include providing guidance material to the sector, educating the sector and the public, running a website and communicating with the public as well as administering the powers contained in the Bill such as those relating to registration, collecting reports, enforcement and monitoring.

1.75 The ACNC Commissioner will primarily achieve the objects of the Bill by providing the NFP sector with guidance and educative materials to assist the sector to understand and comply with regulatory obligations. This is specifically provided for in the ACNC Commissioner's education function in the Bill.

1.76 The Bill contains a wide spectrum of enforcement powers reflecting that the ACNC would not have powers of enforcement unless specifically provided for in legislation.

1.77 Importantly, the legislation also provides for appropriate limitations on these powers and considerations for the ACNC Commissioner to consider in any exercise of these powers.

1.78 The ACNC Commissioner's enforcement powers are expected to be exercised in a small number of serious cases where the circumstances require it.

1.79 However, where enforcement action is required, the ACNC Commissioner's range of enforcement powers allows the ACNC Commissioner to provide a proportionate, balanced and effective regulatory response.

## Objects of the Bill

1.80 The objects of the Bill are: to maintain, protect and enhance the public trust and confidence in the NFP sector; to support and sustain a robust, vibrant, independent and innovative NFP sector; and to promote the reduction of unnecessary regulatory obligations on the NFP sector. *[Subsection 15-5(1)]*

1.81 These objects will be pursued through:

- the establishment of a national regulatory framework specifically focussed on NFP entities to reflect the unique goals, structures and funding arrangements of NFPs;
- the establishment of the ACNC Commissioner who will be responsible for:
  - registration of entities according to type and subtypes;
  - administering the national regulatory framework; and
  - assisting registered entities to comply with and understand their regulatory obligations.

*[Subsection 15-5(2)]*

1.82 Registration with the ACNC is voluntary. However, NFP entities must be registered with the ACNC in order to access certain Commonwealth concessions, exemptions and benefits which are contingent on registration. *[Subsections 15-5(3)]*

1.83 Registration is a necessary prerequisite for access to Commonwealth tax concessions. Registration may also be necessary for

NFPs to access other concessions, exemptions and benefits.  
*[Subsections 15-5(3) and (4)]*

1.84 Registration is explained in Chapter 3 — Registration.

***Public trust and confidence***

1.85 The terms ‘public trust’ and ‘confidence’ have their ordinary meaning and are used throughout this Bill to refer to the positive ways in which the Australian public views the NFP sector.

1.86 The NFP sector is held in high regard by the Australian community, as it provides vital services, assists the needy and contributes to creating vibrant and diverse communities across the country.

1.87 This Bill aims to support public trust and confidence in the NFP sector into the future. It does so in a variety of ways, including by establishing a national regulatory framework for the sector, by creating a publicly available Register, and by ensuring that entities meet principles-based governance standards.

1.88 High levels of public trust and confidence in the NFP sector encourage philanthropic giving, volunteerism and public engagement with the sector.

1.89 Public trust and confidence is strengthened by information, transparency, accountability, openness and effectiveness. It may be weakened by misconduct, opacity, misinformation and illegality.

1.90 Just as the positive actions of one NFP entity can reflect positively on the sector, the negative actions of one NFP entity can reflect negatively on the sector.

***Promoting the reduction of unnecessary regulatory obligations on NFPs***

1.91 The ACNC will work with other regulators and cooperate with other government agencies to promote the reduction of unnecessary regulatory obligations on the NFP sector. *[Section 15-5(1)(c)]*

1.92 The regulatory framework set out in this Bill establishes the ACNC with sufficient powers to enable it to take the central regulatory role for the NFP sector, undertaking functions that were previously performed by the ATO or ASIC.

1.93 The Bill also provides the ACNC with broad powers to share information with other government agencies (subject to the protections on

personal and confidential information, explained in Chapter 11) in order to facilitate regulatory cooperation.

1.94 The ACNC will work collaboratively to ensure that NFPs are regulated appropriately in a balanced manner which maintains an appropriate level of oversight but does not unnecessarily burden the sector.

1.95 The Bill establishes the ACNC as a single interface for core matters minimising the interactions that NFPs must engage in with government.

1.96 The ACNC will cooperate with other regulators, including the development of memoranda of understanding that will govern the way that regulators will work together. The ACNC will also work to put in place administrative practices to ensure appropriate levels of regulatory supervision without the imposition of unnecessary procedural requirements including administrative procedures and practices.

1.97 As a regulator, the ACNC will co-operate and work with other agencies to consolidate and standardise information that is sought from NFPs to minimise the burden which repeatedly seeking the same information would impose on NFPs.

1.98 The ACNC will advance initiatives to reduce unnecessary reporting, including implementing a “report-once, use-often” framework and developing the charity passport (which is a collection of core information that has already been gathered by the ACNC as part of the registration process or annual information statement) which can then be provided to other government agencies negating the need for other agencies to collect that information, minimising the interactions that NFPs need to have with government.

1.99 This framework will promote better regulation of the NFP sector, minimising the regulatory burden on NFPs while allowing for the better and less resource intensive management of risk through coordinated action.

### **Furthering the objects of the Bill**

1.100 In undertaking his or her role, the ACNC Commissioner will have regard to a number of factors to ensure that he or she considers all stakeholders (for example, the public and NFPs) in exercising his or her powers and functions, and that the ACNC Commissioner pursues best practice regulation. *[Section 15-10]*

1.101 In undertaking his or her role, the ACNC Commissioner will have regard to:

- the maintenance, protection and enhancement of public trust and confidence in the NFP sector;
- the need for transparency and accountability of the NFP sector to the public (including donors, members and beneficiaries) by ensuring they have access to information about NFP entities;
- the benefits of providing information to the public about NFP entities;
- the maintenance and promotion of the effectiveness and sustainability of the sector;
- the upholding of principles relating to regulatory necessity, risk and proportionality;
- the need to cooperate with other Australian government agencies, including in order to minimise procedural requirements and procedural duplication;
- the effective administration of the laws that confer functions and powers on the ACNC Commissioner;
- the benefits derived from assisting NFP entities with their obligations under the Bill, including through the provision of education and guidance to NFP entities; and
- the diversity of the NFP sector.

*[Section 15-10]*

1.102 The list of factors that the ACNC Commissioner will have regard to is similar to those provided for other Commonwealth regulators such as ASIC and the Tertiary Education Quality and Standards Agency (TEQSA).

1.103 As they do for ASIC and TEQSA, this list of factors sets out how the ACNC should approach all its activities so that they are in line with the objects of the Bill.

1.104 While the nature of these factors means that there will be some overlap between them, each factor is integral to guiding the ACNC's approach to regulation.



1.105 The ACNC Commissioner will have regard to issues of regulatory necessity, risk and proportionality to ensure that his or her actions are suitable and relative to individual circumstances. These concepts involve ensuring that regulatory responses give consideration to the different circumstances of different entities, including entity size, revenue and donations received from the public.

1.106 In furthering the objects of this Bill, the ACNC will work to ensure cooperation with other regulators so as to ensure that procedural requirements and duplication are minimised where possible. The ACNC will also work to educate the sector about regulatory requirements.

1.107 The ACNC Commissioner will have regard to the need to ensure that the law is administered effectively, and that it imposes a minimum of procedural requirements on registered entities.

1.108 The ACNC's approach will take into account the size, level of risk and history of each registered entity. This means that the ACNC Commissioner will have regard to the diversity of the NFP sector, and will respond accordingly.

1.109 The ACNC will also provide education to the sector and to the public about the NFP sector. The ACNC will thus be a platform for greater engagement between the NFP sector and the public and vice versa.

1.110 The Bill does not allow the Commissioner to collect fees for providing information, or for other purposes. Therefore, guidance and education provided by the ACNC must be provided for free.

1.111 Taking these factors into account will ensure that when undertaking its role, the ACNC balances these important considerations to provide a regulatory framework which underpins a strong and vibrant NFP sector.



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## **Chapter 2**

### **Constitutional basis for the Bill**

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#### **Outline of chapter**

2.1 This Chapter explains the constitutional basis for the Australian Charities and Not-for-Profits Commission Bill 2012 (Bill).

#### **Detailed explanation of new law**

2.2 Under *The Constitution*, the Commonwealth does not have any legislative power specifically to regulate the not-for-profit (NFP) sector. As a result, different Commonwealth powers support different aspects of the Bill.

#### **Taxation power**

2.3 Paragraph 51(ii) of the *The Constitution* (the taxation power) allows the Commonwealth to make laws with respect to taxation. The taxation power supports the provisions of the Bill that:

- establish a registration scheme as a prerequisite for NFPs to access certain Commonwealth tax concessions (Part 2-1);
- empower the Governor-General to make regulations prescribing particular standards that entities need to meet as a prerequisite for being registered and remaining entitled to be registered (Part 3-1);
- set out the record keeping and reporting obligations applicable to registered entities — to the extent that these are imposed in order to enable an assessment of an entity's entitlement to registration, compliance with the parts of the Bill or the regulations supported by the taxation power, or compliance with any taxation law as defined in the *Income Tax Assessment Act 1997* (Part 3-2);
- require registered entities to notify the Australian Charities and Not-for-profits Commission Commissioner (ACNC) Commissioner (ACNC Commissioner) of certain matters in

circumstances where those matters may affect their entitlement to registration (Division 65);

- empower the ACNC Commissioner to obtain information for the purpose of determining whether a registered entity has complied with certain provisions of the Bill (or legislative instruments made under the Bill) supported by the taxation power (Division 70);
- empower the ACNC Commissioner to obtain information for the purpose of determining whether information given in compliance or purported compliance with provisions of the Bill (or legislative instruments made under the Bill) supported by the taxation power is correct (Division 70);
- empower ACNC officers to monitor whether certain provisions of the Bill (or legislative instruments made under the Bill) supported by the taxation power have been complied with (Division 75); and
- empower ACNC officers to monitor whether information given in compliance or purported compliance with provisions of the Bill (or legislative instruments made under the Bill) supported by the taxation power is correct (Division 75).

2.4 The provisions of the Bill supported by the taxation power will apply in relation to all registered entities.

### **Communications power**

2.5 Paragraph 51(v) of the *The Constitution* (the communications power) allows the Commonwealth to make laws with respect to ‘postal, telegraphic, telephonic, and other like services’ — including electronic communications. The communications power supports the provisions of the Bill that require the ACNC Commissioner to maintain the Australian Charities and Not-for-profits Register, an electronic database that must be made available for public inspection on the internet (Part 2-2).

2.6 The communications power also supports the provisions of the Bill that:

- empower the ACNC Commissioner to obtain information for the purpose of determining whether information provided to the ACNC Commissioner by an entity, and included on the Register in accordance with Division 40, is correct (Division 70); and

- empower ACNC officers to monitor whether such information is correct (Division 75).

## Corporations power and Territories power

2.7 Certain parts of the Bill only apply in relation to ‘federally regulated entities’ (FREs), which are essentially entities that the Commonwealth has power to regulate under paragraph 51(xx) of *The Constitution* (the corporations power) or section 122 of *The Constitution* (the Territories power). The corporations power allows the Commonwealth to make laws with respect to certain types of corporations (paragraph 51(xx) corporations). The Territories power allows the Commonwealth to make laws for the government of any Territory.

2.8 Where a registered entity is an FRE because it is a paragraph 51(xx) corporation or a trust whose trustees are all paragraph 51(xx) corporations, the corporations power supports the provisions of the Bill that empower the ACNC Commissioner to:

- give warnings and directions to that FRE (Divisions 80 and 85);
- accept and seek Court enforcement of certain undertakings made by that FRE (Division 90);
- seek, and a Court to grant, injunctions relating to that FRE (Division 95); and
- suspend or remove a responsible entity of that FRE, and appoint acting responsible entities (Division 100).

2.9 The Territories power supports these provisions of the Bill in their application to each registered entity that is an FRE because it is a body corporate incorporated in a Territory, a trust whose trustees are all bodies corporate incorporated in a Territory, a body corporate taken to be registered in a Territory under section 119A of the *Corporations Act 2001*, or an entity connected to a Territory in the manner described in paragraphs (d) or (e) of the definition of FRE in section 205-15 of the Bill.

2.10 Additionally, the corporations power and the Territories power respectively support the provisions of the Bill that:

- set out the record keeping and reporting obligations applicable to registered entities — to the extent that these are imposed in order to enable an assessment of an entity’s compliance with the parts of the Bill or the regulations

supported by the corporations power / Territories power (Part 3-2);

- empower the ACNC Commissioner to obtain information for the purpose of determining whether a registered entity has complied with certain provisions of the Bill (or legislative instruments made under the Bill) supported by the corporations power / Territories power (Division 70);
- empower the ACNC Commissioner to obtain information for the purpose of determining whether information given in compliance or purported compliance with provisions of the Bill (or legislative instruments made under the Bill) supported by the corporations power / Territories power is correct (Division 70);
- empower ACNC officers to monitor whether certain provisions of the Bill (or legislative instruments made under the Bill) supported by the corporations power / Territories power have been complied with (Division 75); and
- empower ACNC officers to monitor whether information given in compliance or purported compliance with provisions of the Bill (or legislative instruments made under the Bill) supported by the corporations power / Territories power is correct (Division 75).

### **External affairs power**

2.11 Paragraph 51(xxix) of *The Constitution* (the external affairs power) allows the Commonwealth to make laws with respect to external affairs. ‘External affairs’ in this context includes persons, places, matters or things outside the geographical limits of Australia.

2.12 The external affairs power supports section 50-10 of the Bill in Part 3-1, which empowers the Governor-General to make regulations, specifying the ‘external conduct standards’, for the purpose of regulating funds sent by NFPs outside Australia and activities engaged in by such entities outside Australia.

2.13 Additionally, the external affairs power supports the provisions of the Bill that empower the ACNC Commissioner to take enforcement action in relation to any registered entity in certain circumstances involving the external conduct standards. In these circumstances, the ACNC Commissioner has power to exercise the same enforcement

powers as are available in relation to registered entities that are FREs. In other words, the ACNC Commissioner may:

- give warnings and directions to a registered entity (Divisions 80 and 85);
- accept and seek Court enforcement of certain undertakings made by a registered entity (Division 90);
- seek injunctions from a Court (Division 95); and
- suspend or remove a responsible entity of a registered entity, and appoint acting responsible entities (Division 100).

2.14 The external affairs power also supports the provisions of the Bill that:

- set out the record keeping and reporting obligations applicable to registered entities — to the extent that these are imposed in order to enable an assessment of an entity's compliance with the parts of the Bill or the regulations supported by the external affairs power (Part 3-2);
- empower the ACNC Commissioner to:
  - obtain information for the purpose of determining whether a registered entity has complied with certain provisions of the Bill (or legislative instruments made under the Bill) supported by the external affairs power (Division 70); and
  - obtain information for the purpose of determining whether information given in compliance or purported compliance with provisions of the Bill (or legislative instruments made under the Bill) supported by the external affairs power is correct (Division 70);
- empower ACNC officers to:
  - monitor whether certain provisions of the Bill (or legislative instruments made under the Bill) supported by the external affairs power have been complied with (Division 75); and monitor whether information given in compliance or purported compliance with provisions of the Bill (or legislative instruments made under the Bill) supported by the external affairs power is correct (Division 75).

## **Mixture of powers**

2.15 Other parts of the Bill that comprise overarching or machinery provisions of the ACNC scheme also rely on all of the Commonwealth powers listed above. These parts of the Bill are supported by different powers depending on the particular function or power being exercised under the Bill, the circumstances of its exercise, or the substantive provision of the Bill to which the particular machinery provision relates.

2.16 The parts of the Bill relying on a mix of powers are the provisions that:

- establish the ACNC (Chapter 5) and the Advisory Board (Chapter 6);
- impose secrecy obligations in relation to information obtained under or for the purposes of the Bill, and authorise disclosure of this information in particular circumstances (Part 7-1);
- provide for reviews and appeals of decisions made under the Bill (Part 7-2);
- set out the administrative penalties applicable for making false or misleading statements or failing to lodge documents on time under the Bill (Part 7-3);
- extend the application of the obligations, liabilities and offences of entities under the Bill to the responsible entities of those entities (Part 7-4);
- govern administrative matters relating to the process for providing material to the ACNC Commissioner (Divisions 190 to 195); and
- empower the Governor-General to make regulations prescribing certain matters (Division 200).

2.17 Finally, some Commonwealth powers not mentioned above provide support for discrete aspects of the Bill. For example, to the extent that the information-gathering and monitoring powers in Divisions 70 and 75 relate to provisions of the *Crimes Act 1914* or *Criminal Code*, these powers rely on the Commonwealth powers supporting those criminal laws.



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## **Chapter 3**

### **Registration**

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#### **Outline of chapter**

- 3.1 This Bill provides the Australian Charities and Not-for-profits Commission Commissioner (ACNC Commissioner) with the power to register entities as particular types and subtypes of not-for-profit (NFP) entities.
- 3.2 Such registration is a prerequisite for an entity to access certain Commonwealth tax concessions. The Bill ensures that these tax concessions are available only to entities that are governed and regulated in accordance with the Bill.
- 3.3 Initially, registration with the ACNC is limited to charities. However, the ACNC's role is expected to expand over time to include all NFPs. Further explanation can be found in Chapter 1 — Background.
- 3.4 This Chapter explains the registration processes and eligibility requirements for entities that wish to be registered by the ACNC Commissioner.
- 3.5 It also explains the processes and grounds for the revocation of registration by the ACNC Commissioner and the consequences of having registration revoked.

#### **Rationale for registration rules**

- 3.6 The *Final Report on the Scoping Study for a National NFP Regulator* recommended that a government body should be given the responsibility to endorse and register NFP entities.
- 3.7 It also recommended that registration should be recognised by all agencies at the Commonwealth level.
- 3.8 The Government announced in the 2011-12 Budget that it would charge the ACNC Commissioner with responsibility for registering NFP entities.
- 3.9 The ACNC Commissioner's responsibilities also include collecting relevant information on NFP entities and using this information

as a basis for registering an entity under a type and subtype(s) and monitoring the entity's ongoing eligibility for registration.

3.10 Registration is voluntary. However, registration is a prerequisite for access to certain Commonwealth tax concessions. As such, these tax concessions can only be accessed by those entities registered and regulated under this law.

3.11 Other Commonwealth concessions, exemptions or benefits may also be contingent on registration.

3.12 While registration is voluntary, NFP entities accept responsibilities from being registered and the consequences that may follow from having their registration revoked.

## **Summary of new law**

3.13 The Bill provides the ACNC Commissioner with the power to register NFP entities under their type and subtype.

3.14 Registration by the ACNC Commissioner allows NFP entities to access support in the form of Commonwealth exemptions, concessions and benefits (including tax concessions).

3.15 To be registered by the ACNC Commissioner and to maintain this registration, charities must: apply directly to the ACNC for registration; operate consistently with the definition of charity specified in Australian law, or the requirements of any other type or subtype; and comply with prescribed registration conditions and requirements.

3.16 Transitional rules apply in relation to charities that are endorsed by the Australian Taxation Office (ATO), ensuring a smooth transition to the ACNC. These rules are explained in detail in Chapter 14 — Transitional provisions.

3.17 The Bill also provides the ACNC Commissioner with the power to revoke the registration of entities. The ACNC Commissioner may revoke an entity's registration as a type of entity and as a subtype of entity in certain circumstances.

3.18 The ACNC Commissioner must consider a range of factors before making a decision about revoking an entity's registration.

## Detailed explanation of new law

3.19 The Bill provides for the ACNC Commissioner to register entities as particular types and subtypes of NFP entities. *[Subsection 20-5(1)]*

3.20 The Bill also provides for the Commissioner to revoke the registration of registered entities, in certain circumstances. *[Subsection 20-5(1)]*

3.21 Registration with the ACNC is a prerequisite for access to certain Commonwealth tax concessions. *[Subsection 20-5(2)]*

3.22 Registration may also be a prerequisite for other exemptions, benefits and concessions provided under Australian laws. *[Subsection 20-5(3)]*

## Registration limited to charities

3.23 Registration is initially limited to charities. Charities may be registered according to their subtypes, including public benevolent institutions (PBIs) and health promotion charities. The ACNC's role may expand over time to the registration of all NFP entities.

## Entitlement to registration

- 3.24 An entity is entitled to be registered by the ACNC if it:
- meets the description of the relevant type or subtype;
  - is a NFP;
  - meets the governance standards and external conduct standards;
  - has a current ABN; and
  - is not characterised as engaging in, or supporting, terrorist or other criminal activities under an Australian law.

3.25 If the entity has previously been a registered entity, but its registration as a type of entity has been revoked, that entity is entitled to be re-registered if the ACNC Commissioner is satisfied that the matters which led to the revocation have been dealt with, such that the re-registration of the entity would not conflict with the objects of this Bill. *[Subsections 25-5(1), 25-5(2) and 25-5(3)]*

3.26 An entity is entitled to registration if it meets the description of the relevant type or subtype. *[Paragraphs 25-5(1)(b) and 25-5(2)(b)]*

3.27 Initially, the ACNC will only register charities. Therefore, in order to be entitled to registration as a type of registered entity, an entity must be a charity. *[Paragraph 25-5(1)(b)]*

3.28 The determination of charitable purpose is to be undertaken in accordance with the common law meaning of the term, as affected by the *Extension of Charitable Purpose Act 2004*. *[Subsections 25-5(5) and (6)]*

3.29 To be registered as a subtype of an entity the entity must meet the description of that subtype. *[Paragraph 25-5(2)(b)]*

3.30 The ACNC Commissioner will also use the common law definitions of the relevant subtypes to ensure that an entity meets the requirements.

3.31 Registration as a type or subtype is voluntary. However, only an entity that is so registered can access certain types of support provided by the Commonwealth Government.

3.32 To be entitled to registration, an entity must be a NFP entity. *[Paragraph 25-5(3)(a)]*

3.33 A NFP entity is generally an entity that is not operating for the profit or gain of its individual members, whether these gains are direct or indirect. This applies both while the entity is operating and when the entity winds up.

3.34 Additionally, an NFP entity is one that does not provide any private benefit, directly or indirectly, to a related party such as a trustee, member, director, employee, agent or officer of a trustee, donor, founder, or to an associate of any of these entities (other than reasonable remuneration for services provided or re-imbusement of related costs).

3.35 However, the fact that a NFP entity may make a profit does not negate its NFP status so long as any surplus is applied to the NFP purposes of the entity and the profit does not accrue to the benefit of identifiable members either directly or indirectly.

3.36 An entity is entitled to registration if it meets the governance and external conduct standards. *[Paragraph 25-5(3)(b)]*

3.37 Further explanation of these standards can be found in Chapter 5 — Governance and external conduct standards.

3.38 An entity is entitled to registration if it has a current ABN.  
*[Paragraph 25-5(3)(c)]*

3.39 An entity must have its own ABN to register as a type or subtype. A group of entities cannot register with the ACNC as a single entity.

3.40 An entity is entitled to registration if it is not characterised as engaging in, or supporting, terrorist or other criminal activities under an Australian law. *[Paragraph 25-5(3)(d)]*

3.41 An entity is characterised as engaging in, or supporting, terrorist or other criminal activities if it is covered by an instrument made by an Australian government agency under an Australian law, such as the *Crimes (Controlled Operations) Act 2008* of the Australian Capital Territory.

3.42 An entity which was formerly registered with the ACNC and has had their registration revoked may be registered again if, and only if, in the opinion of the ACNC Commissioner, the matters that led to the revocation of the entity's registration have been remedied, such that registration of the entity would not cause harm to, or jeopardise, public trust and confidence in the NFP sector. *[Paragraph 25-5(1)(c)]*

3.43 Where the ACNC Commissioner registers an entity which has previously had its registration revoked, the second registration does not rescind the ACNC Commissioner's decision to revoke the first registration of that entity. That is, the registered entity will lose access to any concessions, exemptions or benefits that are contingent on registration as a consequence of revocation between the period in which the entity's registration was revoked and the entity being registered again.  
*[Paragraph 25-5(1)(c) note]*

#### Example 3.1

The Moments Foundation's registration was revoked in 2014 and its managing director was convicted of fraud. Two years later the foundation seeks re-registration with the ACNC. It has put in place a new management team and governing board and has a comprehensive risk management plan. The ACNC Commissioner is satisfied that registration is consistent with the object of the Bill, including the maintenance, protection and enhancement of public trust and confidence in the NFP sector. Accordingly, the ACNC Commissioner registers the foundation.

The Moments Foundation's registration remains revoked during the period between revocation in 2014 and re-registration in 2016. The Moments Foundation will not be eligible to access any Commonwealth

tax concessions, exemptions or benefits contingent on registration with the ACNC during the period that it was not registered.

3.44 An entity may be registered as both a type and subtype of entity. It may also be registered as multiple subtypes of an entity provided that it meets the description of the entity subtype in the table in section 5-10(5). However, an entity cannot be registered only as a subtype, it must also be registered as a type of entity. *[Subsection 25-5(4)]*

3.45 Entities are able to apply for registration under multiple subtypes, provided their activities meet the necessary conditions for registration and the requirements of the subtypes do not conflict. *[Subsection 25-5(4)]*

3.46 Some tax concessions are only provided to entities registered as a particular subtype.

### **Example 3.2**

The Mockingbird organisation is registered as an entity with the ACNC as the type — charity and as the subtype — public benevolent institution (PBI). It is able to access the Commonwealth tax concessions available to charities and PBIs, including an income tax exemption and goods and services tax and fringe benefits tax concessions.

The Mockingbird organisation could also register as the type — charity and both the subtype — the relief of poverty, sickness or the needs of the aged and the subtype — public benevolent institution.

If the Mockingbird organisation was registered only as an entity with the type — charity, and did not register as a subtype of entity, it would not be able to access Commonwealth tax concessions that are only available to PBIs, such as fringe benefits tax concessions.

### **Types and subtypes**

3.47 A table has been included in the Bill to explain the types and subtypes of entity that may register with the ACNC. *[Subsection 25-5(5)]*

3.48 The table lists item numbers, type of entity and subtypes of entity.

3.49 In column one, the table currently lists only one type of entity that is entitled to register. This is an entity that is a charity. The table may be expanded in the future to list other types of entities.

3.50 The ACNC Commissioner's determination of an entity's charitable purpose is based on traditional definitions of charity found in the common law as affected by the *Extension of Charitable Purpose Act 2004*. [Subsections 25-5(5) and 25-5(6)]

3.51 The ACNC Bill does not change the existing common law definition of charity, nor does it make any changes to the public benefit test that forms part of that definition.

3.52 The ACNC Commissioner's determination of an entity's charitable status must be accepted by all other Commonwealth Government agencies, including the ATO.

3.53 However, being registered as a charity with the ACNC does not necessarily mean that an entity qualifies as being charitable for State or Territory purposes.

3.54 Column two lists subtypes of entities that are entitled to registration. Items one to four in column two are the heads of charity as recognised in *Commissioners for Special Purposes of Income Tax v. Pemsel (1891)*. These are: the relief of poverty, sickness or the needs of the aged; the advancement of education; the advancement of religion; and purposes that are beneficial to the community. Item five is the tax law definition of a health promotion charity.

3.55 Items five and six (institution whose principal activity is to promote the prevention or control of diseases in human beings and PBIs) have been included as separate items in column two in recognition of the different Commonwealth tax concessions that these subtypes of entities are eligible to receive. Generally entities with these subtypes will also be eligible to register under subtype one (relief of poverty, sickness or the needs of the aged) in column two. [Subsection 25-5(5)]

3.56 Item seven has been included as a subtype to recognise that the *Extension of Charitable Purpose Act 2004* extended the definition of charity to include the provision of NFP childcare services. [Subsection 25-5(5)]

3.57 An entity may register as a type of charity, and as a subtype of charity.

3.58 An entity may also register as more than one subtype. For example, an entity that has PBI status may register with the type — charity and with the subtype — entity with a purpose that is the relief of poverty, sickness or the needs of the aged and the subtype — public benevolent institution. [Subsection 25-5(4)]

3.59 An entity may register with one subtype at one point in time, and register as another subtype at a later point in time.

3.60 For example, an entity may register as the type charity with the subtype – entity with a purpose that is the advancement of religion at one point in time. That entity may later register with the subtype – entity with a purpose that is the advancement of education, in addition to its first subtype registration so long as it meets the requirements for both subtype registrations.

3.61 An entity may not register with more than one subtype where the requirements of those subtypes conflict.

3.62 For example, in order to meet the requirements of the subtype – public benevolent institution, an entity could not meet the requirements of the subtype – entity with a charitable purpose described in section 4 of the *Extension of Charitable Purpose Act 2004* (provision of child care services).

3.63 An entity may not register only as a subtype. An entity must register as a type in order to register as a subtype.

3.64 Registration as a type or subtype is at the entity level. This is the same as the current ATO registration process. As described above, an entity must have its own ABN to register as a type or subtype.

3.65 Entities registered separately may be able to report together. See Chapter 6 — Reporting and record keeping for more information.

### **Process of registration**

3.66 Entities may apply to the ACNC Commissioner for registration as a type or subtype. [*Section 30-5 and subsection 30-10(1)*]

3.67 An application for registration must be in the form approved by the ACNC Commissioner and accompanied by any documents that the ACNC Commissioner requires. The approved form requirements are explained in Chapter 13 — Miscellaneous. [*Subsection 30-10(2)*]

3.68 The ACNC Commissioner may require an applicant to provide additional information where that information is necessary to decide whether the applicant is entitled to registration. In particular, the ACNC Commissioner may require documents that provide proof of identity to be supplied. [*Subsection 30-15(1)*]



3.69 This additional information could include, for example, clarification of responses in applications, certified copies of the governing rules of the entity or further details about responsible entities.

***Dealing with an application for registration***

3.70 If the ACNC Commissioner is satisfied that the applicant meets all of the requirements for registration, then the ACNC Commissioner must register an entity and specify the type and, where relevant, subtype of entity. Otherwise, the ACNC Commissioner must reject the application for registration. *[Section 30-20]*

3.71 The ACNC Commissioner must provide the applicant entity with written notice of his or her decision. *[Section 30-25]*

3.72 The registration has effect from the date specified by the ACNC Commissioner. This date can be retrospective, subject to limitations expressed in the Bill. *[Subsection 30-30]*

3.73 Where the ACNC Commissioner has not made a decision on an application for registration within 60 days of receiving it, the applicant entity may give the ACNC Commissioner written notice, in the approved form, that the entity wishes to treat the application for registration as rejected. *[Subsection 30-15(2)]*

3.74 If an entity gives such notice, the ACNC Commissioner is taken to have refused the application on the day in which the notice is given. *[Subsection 30-15(4)]*

3.75 This ensures that entities have recourse if a decision is not made in the set time and ensures that entities can have the decision reviewed where appropriate.

3.76 If the ACNC Commissioner requests additional information, the application can be taken to have been refused on the later of:

- the end of the 28th day after the last day on which the applicant gives the ACNC Commissioner additional information as required; or
- the end of the 60th day after the application was made.

*[Subsection 30-15(3)]*

**Example 3.3**

The Mosies Foundation applies for registration on 1 March 2013. On 20 April 2013, the ACNC Commissioner requests that further details

about responsible entities (in this case, the directors of the Foundation) be provided. The Mosies Foundation provides this information on 1 May 2013. If the ACNC Commissioner does not notify the foundation of his or her decision by 29 May 2013, the Foundation is entitled to treat the application as refused provided that it gives written notice to the ACNC Commissioner.

### ***Review rights***

3.77 The ACNC Commissioner's decision to reject an application for registration is a reviewable decision. *[Section 30-35]*

3.78 The entity has the right to object to a decision in line with the review and appeals provisions. These are explained in Chapter 12 — Reviews and appeals.

## **Revocation of registration**

3.79 In certain circumstances, the ACNC Commissioner may revoke the registration of a registered entity. This power is necessary to ensure that entities accessing public monies operate transparently and in line with the regulatory requirements, and to ensure that public monies are used appropriately.

3.80 The ACNC Commissioner is able to revoke an entity's registration as a type or subtype of entity if the ACNC Commissioner is satisfied that certain circumstances are present, having considered a number of factors. If the ACNC Commissioner revokes an entity's registration as a type of entity, it must also revoke its registration as a particular subtype. *[Section 35-5]*

### **Example 3.4**

Better People is a registered entity. Better People is registered with a type — charity and the corresponding subtypes — public benevolent institution and entity with a purpose that is the relief of poverty, sickness or the needs of the aged. Better People changes its activities so that it no longer meets the requirements of the subtype — public benevolent institution.

The ACNC Commissioner revokes Better People's registration as a subtype — public benevolent institution, but leaves its registration as a subtype — entity with a purpose that is the relief of poverty, sickness or the needs of the aged.

## Grounds for revocation of registration

3.81 The ACNC Commissioner may only revoke the registration of the entity if he or she is satisfied that at least one of the following conditions is met:

- at any time after the entity's registration, the registered entity was not entitled to be registered as that type of entity (or as the subtype of entity) [*paragraph 35-10(1)(a)*];
- the registered entity provided information that was false or misleading in a material particular in connection with its application for registration [*paragraph 35-10(1)(b)*];
- the registered entity has contravened, or is more likely than not to contravene a provision of this law, or has not complied, or is more likely than not to not comply with a governance standard or an external conduct standard [*paragraph 35-10(1)(c)*];
- the registered entity has a trustee in bankruptcy, a liquidator, or a person authorised to manage the affairs of the entity under an Australian law because it is unable to pay all its debts when they become due and payable [*paragraph 35-10(1)(d)*]; or
- the entity has made a request to the ACNC Commissioner that its registration as a type or subtype of entity be revoked [*paragraph 35-10(1)(e)*].

3.82 The ACNC Commissioner may only revoke an entity's registration where one of these grounds is met following consideration of a number of factors.

3.83 The ACNC Commissioner may revoke the registration of an entity, if, at any time after the entity's registration, the entity has lost its entitlement to be registered in accordance with section 5-10 of the Bill. [*Paragraph 35-10(1)(a)*]

### Example 3.5

The MED organisation is no longer undertaking charitable activities and is not operating on an NFP basis. It is no longer entitled to registration and its registration can be revoked.

### Example 3.6

The registration of the Green Apple organisation as an entity whose principal activity is to promote the prevention or the control of diseases in human beings is revoked because it no longer meets the requirements of this subtype, however, it still has charitable purposes and remains registered as a charity.

3.84 Revocation of registration can also occur where information that was false or misleading in a material particular has been provided in connection with a registered entity's application for registration. This ground for revocation ensures that entities do not fraudulently obtain registration by providing misleading information in their applications for registration. [*Paragraph 35-10(1)(b)*]

### Example 3.7

The KIO Trust is registered with the ACNC. It is brought to the attention of the ACNC Commissioner that the trust provided false information in its application for registration, including making misleading statements about the identity of responsible entities and providing misleading information about the nature of its purpose and activities. The trust's registration can be revoked by the ACNC Commissioner.

3.85 Registration may also be revoked where an entity has contravened, or is more likely than not to contravene a provision of the Bill, or has not complied, or is more likely than not to not comply, with a governance standard or external conduct standard. [*Paragraph 35-10(1)(c)*]

3.86 The ACNC Commissioner will aim to use education and guidance to assist registered entities to understand and comply with their obligations under this Bill.

3.87 However, where enforcement action is required the ACNC Commissioner will have a range of enforcement powers, including the power to revoke registration, to ensure he or she can provide appropriate and effective regulatory responses in a range of circumstances. Further information on the compliance approach of the ACNC Commissioner can be found in the June 2012 *Australian Charities and Not-for-profits Commission Taskforce Implementation Report*.

### Example 3.8

The FM Foundation contravenes the Bill by not notifying the ACNC Commissioner of a change to the responsible entities of the Foundation. The change in the responsible entity is brought to the ACNC Commissioner's attention when that responsible entity commits fraud by entering into a contract with a spouse to acquire assets at a

substantial discount. The ACNC Commissioner directs the foundation not to perform the contract. The FM Foundation fails to comply with the direction. The ACNC Commissioner may revoke the registration of the Foundation.

3.88 This ground of revocation allows the Commissioner to consider both contraventions and cases where it is more likely than not that an entity will contravene a provision of the Bill and both non-compliance and cases where it more likely than not that the registered entity will not comply with the governance and external conduct standards.

3.89 This ground only covers a situation where there is a substantial or significant likelihood of a contravention or non-compliance and would not extend to a situation where there was only a small chance of a contravention or non-compliance occurring.

3.90 In determining whether an entity is more likely than not to contravene a provision of this law or is more likely than not to not comply with a governance standard or external conduct standard, the ACNC Commissioner must have sufficient, reliable and accurate evidence which clearly indicates that there will be a contravention.

3.91 A mere suspicion, rumour or possibility of a likely contravention or likely non-compliance is insufficient for the ACNC Commissioner to take action.

3.92 In addition, a ‘reasonably believes’ test needs to be satisfied which ensures that the ACNC Commissioner will only revoke registration for likely contraventions where a reasonable individual, provided with the set of information available to the ACNC Commissioner, would conclude that it is more likely than not that a registered entity will contravene a provision of the Bill.

3.93 An example of a more likely than not contravention is when a registered entity enters into a contract, the terms of which contravene a provision of this Bill by providing for the transfer of assets contrary to the entity’s charitable purpose. Until the registered entity performs the contract, it may not have contravened the Bill. Yet, a contract that has not yet been performed is sufficient evidence that a registered entity is likely to contravene the Bill. This enables the Commissioner to intervene to prevent the breach from occurring, and proactively protect the charity’s assets before they may be depleted.

3.94 Where a registered entity has a trustee in bankruptcy, a liquidator or a person authorised to manage its affairs because it is unable to pay all its debts as and when they become due and payable, that entity’s registration may be revoked. *[Paragraph 35-10(1)(d)]*

3.95 This condition ensures that the ACNC Commissioner is able to act, if it is necessary, where significant charitable assets may be at risk due to the insolvency of the entity and to ensure that the public can rely on their donations to a registered entity being used for NFP purposes.

3.96 The ACNC Commissioner may also revoke the registration of an entity that wishes to have its registration revoked as a type or subtype of entity. For instance, where an entity wishes to change its purpose such that its current subtype is no longer appropriate. [*Paragraph 35-10(1)(e)*]

#### Example 3.9

The Fairsight Foundation is registered as a charity and is registered under the subtypes — entity with a purpose that is the advancement of religion and entity with a purpose that is the relief of poverty, sickness, or the needs of the aged. The Foundation changes its activities so that it no longer meets the requirements of the subtype — entity with a purpose that is the relief of poverty, sickness, or the needs of the aged. The Foundation requests that its registration as the subtype — entity with a purpose that is the relief of poverty, sickness, or the needs of the aged be revoked. The ACNC Commissioner may revoke the Fairsight Foundation's registration as a subtype. The Fairsight Foundation continues to be registered with the subtype — entity with a purpose that is the advancement of religion.

#### Example 3.10

The Fairsight Foundation, as described above, is registered with two subtypes. The Fairsight Foundation merges with another entity and requests that its registration be revoked. The Foundation's registration (as both a type and subtypes) can be revoked by the ACNC Commissioner.

### **Considerations for revocation of registration**

3.97 The new law provides for a list of factors that the ACNC Commissioner must consider before deciding to revoke the registration of an entity. These factors require the ACNC Commissioner to balance different considerations to ensure that any decision to revoke an entity's registration is proportional and appropriate in all circumstances. [*Subsection 35-10(2)*]

3.98 The ACNC Commissioner's education and guidance will assist registered entities to understand and comply with their obligations under this Bill. However, where enforcement action is required the ACNC Commissioner has a range of enforcement powers, including the power to issue directions, so that the ACNC Commissioner can provide a proportionate and effective regulatory response.

3.99 The considerations include factors to ensure that, wherever possible, other options to help promote compliance, such as education, are considered before an entity's registration is revoked.

3.100 In some situations, such as in relation to minor non-compliance and where other measures such as warning notices or enforceable undertakings are available, it would not be appropriate to revoke an entity's registration.

3.101 In other situations revocation will be necessary, even where other enforcement actions are available to the ACNC Commissioner and have not been taken.

3.102 Revocation of registration will only be used as a last resort, but it is a necessary power to ensure that the ACNC Commissioner can act in circumstances of serious non-compliance where it would be inappropriate for an entity to remain registered.

3.103 In deciding whether or not to revoke an entity's registration, the ACNC Commissioner must consider:

- the nature, significance and persistence of any contravention or non-compliance [*paragraph 35-10(2)(a)*];
- what action the ACNC Commissioner, the registered entity, or any of the responsible entities could have or have taken:
  - to address any contravention or non-compliance (or prevent any such contravention or non-compliance that is more likely than not); or
  - to prevent any similar contravention or non-compliance [*paragraph 35-10(2)(b)*];
- the desirability of ensuring that contributions made to the registered entity are applied consistently with the NFP nature and the purpose of the registered entity [*paragraph 35-10(2)(c)*];
- the objects of any Commonwealth laws that refer to registration under this Bill [*paragraph 35-10(2)(d)*];
- the extent (if any) to which the registered entity is conducting its affairs in a way that may cause harm to or jeopardise the public trust and confidence in the NFP sector [*paragraph 35-10(2)(e)*];

- the welfare of members of the community (if any) that receive direct benefits from the registered entity; and *[paragraph 35-10(2)(f)]*
- any other matter that the ACNC Commissioner considers relevant *[paragraph 35-10(2)(g)]*.

3.104 This list of factors should be considered in its entirety and a decision should be made by balancing each of the factors.

3.105 Using this list of factors, the ACNC Commissioner must consider the nature, significance and persistence of any contravention or non-compliance. Accordingly, the ACNC Commissioner would consider differences in the case for revocation for an entity that has committed a single contravention that is of low significance and the case for an entity that has repeatedly and significantly contravened the Bill. *[Paragraph 35-10(2)(a)]*

3.106 The ACNC Commissioner must also consider what action could have been taken or could be taken to address or prevent the contravention or non-compliance by the ACNC Commissioner, the registered entity or any of the responsible entities. *[Paragraph 35-10(2)(b)]*

3.107 This factor ensures that the ACNC Commissioner considers the options available to address or prevent the contravention or non-compliance (for example education or an enforceable undertaking), and what action has been taken.

3.108 This allows the ACNC Commissioner to acknowledge differences between a registered entity that took steps to prevent or address non-compliance or contravention and one that did nothing or was deceptive.

3.109 This factor also allows the ACNC Commissioner to consider what action has been taken by the registered entity, responsible entity or ACNC Commissioner themselves, to address the contravention or non-compliance since it was made known.

3.110 Furthermore, this factor also requires the ACNC Commissioner to consider the range of their enforcement powers to ensure they choose the most appropriate response to remedy the issue in the circumstances.

3.111 The ACNC Commissioner must also consider the desirability of ensuring that contributions made to the registered entity are applied consistently with the NFP nature and purpose of the entity. *[Paragraph 35-10(2)(c)]*



3.112 This factor ensures that where contributions have been made by donors, volunteers, funding bodies etc. For a registered entity to carry out a particular activity or to pursue a charitable purpose, the ACNC Commissioner can act to protect their interests. This factor also ensures that the ACNC Commissioner can consider whether there is a risk of fraud or misapplication of those contributions, which in the context of NFPs would be a very serious compliance issue.

3.113 This factor further allows the ACNC Commissioner to consider the need to ensure the proper application of a registered entity's assets.

3.114 A **contribution** to a registered entity is defined as the provision of money, property or any other benefit to the entity and includes the following:

- the provision by an individual of her or his time or reputation to the entity; and
- the provision by a government of tax concessions or other forms of government support to the entity.

*[Section 205-40]*

3.115 The ACNC Commissioner is also required to consider the objects of other Commonwealth laws that refer to registration with the ACNC in deciding whether revocation is appropriate. For instance, it will be necessary to consider the taxation consequences of continuing or revoking the registration of an entity, including the integrity of the tax system. *[Paragraph 35-10(2)(d)]*

3.116 The ACNC Commissioner must consider the extent (if any) to which the registered entity is conducting its affairs in a way that may cause harm to or jeopardise the public trust and confidence in the NFP sector. *[Paragraph 35-10(2)(e)]*

3.117 This factor allows the ACNC Commissioner to consider whether or not the contravention or non-compliance has harmed or will harm the public trust and confidence in the NFP sector, and accordingly, if revocation of registration is an appropriate consequence.

3.118 This factor recognises the role of the ACNC Commissioner as the regulator for the whole of the NFP sector.

3.119 Public trust and confidence, and the ways in which public trust and confidence can be strengthened and weakened are discussed in Chapter 1 – Background.

3.120 The ACNC Commissioner must consider the impact of one registered entity's actions on other NFPs, for example, where one entity's misdeeds cause a loss of confidence and could affect the whole sector, particularly its ability to access funding.

#### Example 3.11

Sweeland Inc is registered with the subtypes — public benevolent institution and entity with a purpose that is the relief of poverty, sickness or the needs of the aged. Sweeland Inc changes its activities so that it no longer meets the requirements of the subtype — public benevolent institution. It continues to conduct charitable activities that help to relieve poverty. It requests that the ACNC Commissioner revoke its subtype registration as a public benevolent institution.

The ACNC Commissioner considers that this revocation will not jeopardise the public trust and confidence in the NFP sector, as Sweeland Inc still effectively conducts its relief of poverty activities and meets all its other regulatory obligations. Considering all the factors listed above, the Commissioner decides to revoke Sweeland Inc's subtype registration as a public benevolent institution.

#### Example 3.12

Monroe Kids is registered with the ACNC as a charity. When it first registered it helped to relieve the poverty of teenagers in disadvantaged areas. It comes to the ACNC Commissioner's attention that Monroe Kids no longer helps disadvantaged teenagers in poverty, but runs a reputable after-school sports program for all teenagers in the area. As such, Monroe Kids is no longer entitled to registration as a charity, as after-school sports programs are not considered charitable according to the common law definition.

The ACNC Commissioner considers that the public trust and confidence in the sector is not at risk, as Monroe Kids is still conducting beneficial activities in the area. However, considering all the other factors, the ACNC Commissioner decides to revoke the registration of Monroe Kids.

#### Example 3.13

Core Pursuits is registered with the ACNC. It comes to the Commissioner's attention that the management of Core Pursuits has been using deductible gift recipient (DGR) funds to purchase lavish properties for their own personal use.

This action may cause future donors to doubt that their donations will be used to further an organisation's NFP purpose, and may lead to a reduction in philanthropic giving across the sector. Core Pursuit's actions place the public trust and confidence in the sector in jeopardy.

Having regard to the other factors listed above, the Commissioner decides to revoke Core Pursuit's registration.

3.121 The ACNC Commissioner must consider the welfare of members of the community (if any) that receive direct benefits from the registered entity. This means that the ACNC Commissioner must consider whether the wellbeing of recipients of charitable services may be improved or worsened by an entity's registration being revoked. *[Paragraph 35-10(2)(f)]*

3.122 The ACNC Commissioner must also consider any other matter that he or she considers relevant. *[Paragraph 35-10(2)(g)]*

#### **Example 3.14**

The Orange Book Foundation is a registered entity that purports to provide assistance to needy people in urban centres, however, it has merely been used for money laundering purposes. This is a significant contravention of the Bill with the potential to severely jeopardise public trust and confidence in the NFP sector. In considering all the required factors, it would be reasonable for the ACNC Commissioner to revoke the entity's registration even though it is the only instance of non-compliance and no other enforcement action has been taken.

#### **Example 3.15**

The Human Charity is a federally regulated entity that is registered with the ACNC. A responsible entity on the Board of the Human Charity is charged with fraud. The other responsible entities act quickly to notify the ACNC Commissioner and remove the responsible entity from the Board.

In this case, while the contravention of the Bill is serious, the ACNC Commissioner could consider that the other board members acted quickly and appropriately to address the contravention, and that this was a single contravention of the Bill. The issue has been addressed so there is no need for enforcement action or revocation of registration.

#### **Example 3.16**

Aloe Wishes is a federally regulated entity that is registered with the ACNC. Aloe Wishes enters into a related party transaction, the terms of which contravene the Bill. Aloe Wishes has yet to complete the transaction and, prior to this, has never contravened the Bill. Taking into account the list of factors described above, the ACNC Commissioner decides that issuing a direction to the entity not to perform the related party transaction is the most appropriate enforcement action in a situation where the entity appears not to wish to take voluntary action.

3.123 If the ACNC Commissioner decides to revoke the registration of an entity, the ACNC Commissioner must give the entity written notice (and within that notice provide a statement of reasons) within 14 days of the decision to revoke registration which clearly specifies the day on which the revocation takes effect. *[Subsection 35-10(4)]*

3.124 If the reason the ACNC Commissioner revokes an entity's registration is that the entity is not entitled to be registered, the revocation may take effect from the day the entity first ceased to be entitled or a later day, as specified by the ACNC Commissioner. *[Paragraph 35-10(3)(a)]*

3.125 If the reason the ACNC Commissioner revokes an entity's registration is that the registered entity provided, in connection with its application for registration, information that was false or misleading in a material particular, the revocation may take effect from the day on which the registration took effect, or a later day as determined by the ACNC Commissioner. *[Paragraph 35-10(3)(b)]*

3.126 In all other circumstances, the revocation takes effect on the day the ACNC Commissioner decides to revoke an entity's registration or on a later day specified by the ACNC Commissioner. *[Paragraph 35-10(3)(c)]*

### **Show cause notices**

3.127 In general, the ACNC Commissioner will pursue all other avenues to address issues before considering revocation of registration. Where the ACNC Commissioner believes on reasonable grounds that a registered entity is not entitled to registration then prior to taking any revocation action, the ACNC Commissioner is required to give an entity a notice to show cause why an entity's registration should not be revoked. *[Subsection 35-15(1)]*

3.128 The show cause notice must state the grounds on which the notice is given and invite the registered entity to respond in writing within 28 days after the day the notice is given. *[Subsection 35-15(2)]*

3.129 The notice provides the entity with the opportunity to give the ACNC Commissioner, within 28 business days, a written statement showing cause why the ACNC Commissioner should not revoke its registration. *[Paragraph 35-15(2)(b)]*

3.130 This ensures that prior to the revocation of the registration of an entity, the registered entity has the opportunity to respond to the ACNC Commissioner and explain why its registration should not be revoked. While the ACNC Commissioner will, as a matter of practice, provide education and other opportunities to remedy any problems in advance of such a notice being issued, this mechanism allows for a final opportunity

to ensure that entities have an opportunity to state their case prior to revocation.

3.131 In certain very serious cases where the Commissioner believes the circumstances warrant more immediate action, the ACNC Commissioner is not required to issue a show cause notice, or to wait for a response to a show cause notice. *[Subsection 35-15(3)]*

3.132 In such circumstances, and having regard to the factors listed in subsection 35-10(2), the ACNC Commissioner may revoke an entity's registration where no show cause notice has been issued, and where a show cause notice has been issued, where no response has yet been received. *[Subsection 35-15(3)]*

3.133 In all other circumstances, the ACNC Commissioner is required to issue a show cause notice before an entity's registration can be revoked.

3.134 This ensures that in very serious circumstances the ACNC Commissioner is not constrained from taking immediate action where a failure to do so would have very serious implications for public trust and confidence in the NFP sector and the interests of innocent third parties who are relying on the ACNC Commissioner's continued registration of the entity, for example, donors, volunteers and other government agencies.

#### **Example 3.17**

The CD Foundation is a registered entity which purports to pursue charitable purposes. However, it has merely been acting as a conduit for a terrorist organisation. It would be reasonable for the ACNC Commissioner to revoke the entity's registration even though no show cause notice has been issued.

### **Review rights**

3.135 The ACNC Commissioner's decision to revoke the registration of a registered entity is a reviewable decision. *[Section 35-20]*

3.136 The entity has the right to object to a decision in line with the review and appeals provisions. These are explained in Chapter 12 — Reviews and appeals.



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## **Chapter 4**

# **Australian Charities and Not-for-profits Register**

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### **Outline of chapter**

- 4.1 The Bill provides for the Australian Charities and Not-for-profits Register (the ACN Register) and specifies the information that the ACNC Commissioner is to maintain in the ACN Register about each registered, and formerly registered, entity.
- 4.2 The ACN Register is to be made available on the internet.
- 4.3 The ACNC Commissioner may remove or withhold information from the ACN Register in specified circumstances, subject to a public interest test.

### **Summary of new law**

- 4.4 The ACNC Commissioner is to maintain the ACN Register and include specified information about each registered, and formerly registered, entity.
- 4.5 The specified information includes name, contact and identifying details for each entity, the type and subtype of registration, governing rules, responsible entities, information from financial and information statements, details of any enforcement action taken under Chapter 4 of the Bill and any resolution or response to such a matter and any other information prescribed in regulations.
- 4.6 The ACN Register is to be maintained electronically and made available on the internet.

## **Detailed explanation of new law**

### **ACNC Commissioner to maintain the ACN Register**

4.7 Currently there is no single source of standardised information where the public can easily obtain information about not-for-profit (NFP) entities.

4.8 The Bill provides for a single source of easily accessible public information to increase transparency, enable NFP entities to demonstrate appropriate levels of accountability and governance, provide information to the public about registered entities and promote public confidence, informed choices and philanthropy.

4.9 The information to be included on the ACN Register is consistent with information made available on the internet sites of regulators of charities in overseas jurisdictions.

4.10 The ACNC Commissioner is to maintain the ACN Register which will include specified information. *[Subsection 40-5(1)]*

4.11 The information includes the contact and identifying details of registered and formerly registered entities. This includes the entity's name, contact details (including address for service) and the entity's Australian Business Number (ABN). *[Subparagraphs 40-5(1)(a)(i) to (iii) and 40-5(1)(b)(i) and (ii)]*

4.12 The ACN Register must also provide information about the registration status of entities. This includes, the type and subtypes under which entities are (or were) registered and the dates of effect of each registration. *[Subparagraphs 40-5(1)(a)(iv) to (vi) and 40-5(1)(b)(iii) to (v)]*

4.13 The information also includes the entity's governing rules (as explained in Chapter 13 — Miscellaneous) and the name of each responsible entity and the position held by that responsible entity. *[Subparagraphs 40-5(1)(a)(vii) and 40-5(1)(b)(vi) and paragraph 40-5(1)(c)]*

4.14 The ACN Register contains information statements and financial reports (including any accompanying audit or review report that the registered entity has provided). The information contained in the information statements and financial reports is explained in Chapter 6 — Reporting. *[Paragraphs 40-5(1)(d) and (e)]*

4.15 The details of any enforcement action taken by the ACNC Commissioner and any resolution of those matters or response that the entity has made to those matters, as well as any other information



prescribed in the regulations is included on the ACN Register.  
*[Paragraphs 40-5(1)(f) and (g)]*

4.16 The ACNC Commissioner must allow a registered entity 14 days to respond to any enforcement action before the details of the enforcement action are published on the ACN Register, unless the ACNC Commissioner considers that the public interest requires the information to be included on the ACN Register earlier. *[Subsection 40-5(2)]*

4.17 This provides registered entities with an opportunity to respond to the action, and to make the ACNC Commissioner aware of any factors that he or she may not have otherwise been aware of, before information about the enforcement action is made publicly available.

4.18 This ensures that serious enforcement issues are not kept hidden from innocent third parties such as donors and volunteers while ensuring that appropriate context is provided on the ACN Register, both in terms of allowing any response from the entity to be provided and ensuring that the resolution of these matters is also provided. *[Paragraph 40-5(1)(f)]*

#### Example 4.1

The SSSF Foundation is registered with the ACNC. It comes to the Commissioner's attention that two directors of SSSF have been using deductible gift recipient (DGR) funds to purchase vehicles for their own personal use.

The Commissioner removes each director from their position. This misuse of DGR funds is a serious matter and if the Commissioner did not immediately publish that information on the Register, then innocent third parties such as individual donors would be disadvantaged were they to look on the ACN Register and see no problems with SSSF. Donors may be misled and disadvantaged if they were to make donations based on an incomplete ACN Register.

Having regard to the other factors listed above, the Commissioner decides to immediately publish these details on the ACN Register.

4.19 Some of the information provided by entities as part of the information statement may not be required to be published on the ACN Register. The Bill ensures that the information is treated appropriately by providing that information which is classified as "not for publication" is not published on the ACN Register. *[Paragraph 40-5(1)(f)]*

4.20 The ACNC Commissioner sets forms in accordance with the approved form rules explained in Chapter 13 — Miscellaneous.

4.21 The ACNC Commissioner may also publish any other information that is specified in the regulations and that the ACNC Commissioner is authorised to collect under a provision of the Bill. *[Paragraph 40-5(1)(g)]*

4.22 The ACN Register is to be maintained by electronic means and made available for public inspection on the internet. Internet availability assists the public to access and search the information easily. *[Subsections 40-5(3) and (4)]*

4.23 The ACNC Commissioner can make protected Commission information available only in accordance with the secrecy disclosure regime explained in Chapter 11 — Secrecy. *[Subsection 40-5(4) (note)]*

## **The ACNC Commissioner may withhold or remove information from the ACN Register**

4.24 The ACN Register is intended to support the transparency of the NFP sector and enhance public confidence. Therefore the information specified should generally be provided for all registered entities.

4.25 However, the Bill provides the ACNC Commissioner with the authority to withhold, or remove, information from the ACN Register under specified circumstances. *[Section 40-10]*

4.26 This authority assists the ACNC Commissioner to provide information that is factually correct and genuinely informative, is not offensive and does not raise public safety concerns.

### **Sensitive commercial information**

4.27 The circumstances in which the Commissioner may withhold or remove information include that the public release of the information may cause detriment to the entity because it is sensitive commercial information. *[Paragraph 40-10(2)(a)]*

4.28 For example, in considering whether to release information that may be commercially sensitive, the ACNC Commissioner may consider the implications of not releasing this information, including the effect that this would have on the public interest.

4.29 The ACNC Commissioner may also consider the implications of releasing the information on the registered entity.

#### Example 4.2

XYZ Organisation is accumulating reserves to purchase property. The ACNC Commissioner may consider whether releasing the financial information would disadvantage the entity commercially. The information may be withheld on a temporary basis, with disclosure being postponed until the period of sensitivity has passed.

### **Inaccurate, confusing or misleading**

4.30 To ensure the integrity and reliability of the ACN Register, the ACNC Commissioner may decline to include information if it is considered inaccurate or likely to be confusing or misleading, or may be offensive to a reasonable individual. *[Paragraphs 40-10(2)(b) and (c)]*

### **Public safety concerns**

4.31 The Bill provides grounds to exclude information from the ACN Register if it may endanger public safety. *[Paragraph 40-10(2)(d)]*

#### Example 4.3

The West Women's Shelter does not publish its address to protect its clients. The ACNC Commissioner may withhold the entity's address from the ACN Register.

4.32 The Commissioner would always consider the publication of an address of a women's shelter, or similar organisation, as endangering public safety and it would therefore, not be published on the ACN Register. In such a serious case it would not be possible for the Commissioner to reasonably conclude that a public interest in the publication of that information outweighed the safety concerns.

### **Regulations**

4.33 The Bill provides that regulations may allow for other circumstances in which information may be withheld from the ACN Register. This allows for any circumstances that arise to be addressed to ensure that the ACN Register provides accurate and reliable information while catering for those circumstances in which publication of information would not be appropriate. *[Paragraph 40-10(2)(e)]*

4.34 The Bill provides for two types of regulation making powers. Regulations may be made which would prescribe information that should not be published on the ACN Register, this type of information is not subject to a public interest test. *[Subsection 40-10(1)]*

4.35 The Bill also provides for a regulation making power that allows for prescribed information to be withheld or removed from the ACN Register, subject to a public interest test. This addresses the types of information where it is appropriate for the Commissioner to balance any adverse effect that may result from the publication of the information against the public interest. *[Subsections 40-10(2) and 40-10(3)]*

4.36 The Governor-General may make regulations to address unique circumstances where it may not be appropriate for information or classes of information to be disclosed. *[Subsections 40-10(1) and (2)]*

4.37 For example, the regulations could prescribe that certain classes of information should not be published on the ACN register where the information could adversely affect the privacy of individual donors or significantly overburden a charity with administrative costs of responding to members of the public. The regulations may do this by allowing certain information to be withheld in part, by removing or withholding annual reports in full from publication or by withholding information about certain responsible entities.

4.38 During consultation a number of consultees raised concerns with publishing certain types of information about private ancillary funds and that this may adversely affect the privacy of individual donors and could potentially reduce philanthropic engagement. The Governor-General will be able to make regulations addressing these concerns in the ways set out in this Chapter.

4.39 This provides an additional safeguard mechanism to ensure that inappropriate information would not be published on the ACN Register.

### **Public interest test**

4.40 The ACNC Commissioner may include the information on the ACN Register or decline to remove the information from the ACN Register if the ACNC Commissioner considers the public interest in the ACN Register including that information, outweighs any potential adverse effect associated with the release of the information in question. *[Subsection 40-10(3)]*

4.41 The ACNC Commissioner may remove information from the ACN Register if the information has been on the ACN Register for more than 5 years, and the ACNC Commissioner considers that the public interest does not require the information to be retained on the ACN Register. *[Subsection 40-10(4)]*

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## **Chapter 5**

# ***Governance standards and external conduct standards***

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### **Outline of chapter**

- 5.1 This Chapter sets up the framework for:
- the minimum governance standards an entity must satisfy to be and remain a registered entity; and
  - the minimum external conduct standards an entity must satisfy to be and remain a registered entity.
- 5.2 The Governor-General may make regulations relating to the governance standards and external conduct standards.
- 5.3 The Governor-General is expected to make the standards principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards in its particular situation.
- 5.4 The implications of the governance standards and external conduct standards will vary according to the circumstances of a particular registered entity. What a large entity must do to satisfy the requirements will be different from what a small entity must do to satisfy the same requirements.

### **Summary of new law**

- 5.5 ‘Governance’ is the set of practices and procedures in place to ensure that an entity operates to achieve its objectives in an effective and transparent manner.
- 5.6 Governance requirements may be included in:
- existing governing rules, such as constitutions, association rules, cooperative rules, memorandum and articles of association, trust deeds, church laws and statutes;
  - contracts that governments enter into with some not-for-profit (NFP) entities; and

regulatory laws.

5.7 The current governance requirements of a NFP entity depend on:

the type of entity — such as whether it is unincorporated, a trust or a company limited by guarantee, subject to the legislation governing that entity type;

whether the entity is affiliated with a peak body — such as the Australian Council for International Development that has a code of conduct for its members; and

the sector in which the NFP operates — such as the health and education sectors, which have certain governance requirements that must be complied with for an entity to operate in that sector.

5.8 Some NFP entities are currently regulated by Commonwealth legislation, such as companies limited by guarantee, and some are regulated by the States and Territories, such as incorporated associations and charitable trusts. Most are regulated by a combination of Commonwealth and State laws.

5.9 In the absence of a registration regime, the role of de facto regulator for the NFP sector at the Commonwealth level has generally been shared between the ATO and ASIC, as discussed in Chapter 1 — Background.

5.10 The Bill sets up the framework for:

a set of governance standards which apply to most registered entities, and

a set of external conduct standards which apply to all registered entities, regardless of entity type,

and allows the Governor-General to make regulations relating to governance standards and external conduct standards.

5.11 These standards can cover such things as:

the content of a registered entity's governing rules;

the conduct of the registered entity; and

the processes that the registered entity must have in place.

- 5.12 There may be specific governance standards that apply differently to different groups of entities (such as those with members).
- 5.13 There may also be governance standards that do not apply to specified kinds of registered entity.
- 5.14 The governance standards will not apply to entities that are basic religious charities (see Chapter 13 — Miscellaneous for a definition of ‘basic religious charity’).
- 5.15 The external conduct standards will apply to all registered entities.
- 5.16 Only registered entities will have access to certain Commonwealth concessions, exemptions and benefits, including tax concessions.
- 5.17 To be registered, most entities will be required to meet (both initially, to the extent that they can, and on an ongoing basis) the governance standards established in the regulations.
- 5.18 To be registered, an entity is required to meet (both initially, to the extent that they can, and on an ongoing basis) the external conduct standards established in the regulations.
- 5.19 When an entity applies to the Australian Charities and Not-for-profits Commission (ACNC) to become a registered charity, they will initially be required to meet any governance standards which require entities to have certain things in their governing rules in order to be registered, and to show that they have required processes in place. Any governance standards which require certain conduct from registered entities may not be able to be demonstrated or met initially, but are to be met on an ongoing basis.
- 5.20 The governance and external conduct standards will set a minimum level of behaviour for all entities registered with the ACNC. As a result, the public can be confident that the funds the community gives to registered entities are being put to an appropriate use.
- 5.21 The standards will provide assurance that registered entities meet community expectations about the use of public monies, volunteer time and donations (such as using their resources efficiently), and minimise the risk of mismanagement and misappropriation.
- 5.22 Further, the standards will create a framework to protect entities and their mission or purpose from mismanagement, and will ensure that

the entity is focussed on its mission, and not the goals or interests of others.

5.23 The standards are expected to be principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation.

5.24 A registered entity's prolonged non-compliance with a governance or external conduct standard could lead to the Australian Charities and Not-for-profits Commission Commissioner (ACNC Commissioner) revoking an entity's registration. See paragraphs 5.71 to 5.81.

5.25 For certain entities, the ACNC Commissioner may invoke the enforcement provisions in relation to non-compliance of the governance standards. For all entities, the ACNC Commissioner may invoke the enforcement provisions in relation to non-compliance of the external conduct standards (except to remove or suspend the responsible entity of a basic religious charity).

5.26 The ACNC Commissioner's education and guidance will assist registered entities to understand and comply with their obligations under the Bill. However, where enforcement action is required the ACNC Commissioner has a range of enforcement powers, including the power to issue directions, so that the ACNC Commissioner can provide a proportionate and effective regulatory response.

5.27 For example, the ACNC Commissioner may suspend a director if the ACNC Commissioner has reason to believe the entity has not complied with the governance standards or external conduct standards, and the removal of that director is necessary to address the breach. See Chapter 9 — Education, compliance and enforcement.

5.28 Transitional arrangements will be put in place in the regulations to allow registered entities time to make any necessary changes (for example, to internal procedures or their governing rules), to meet the governance standards and external conduct standards when they are established.

5.29 Registered entities must comply with the governance standards and external conduct standards as far as possible during the transition period without breaching their governing rules.



## Detailed explanation of new law

### *Governance standards*

5.30 The Bill sets up a framework for a set of principle-based minimum governance standards applying to most registered entities, regardless of entity type. Registered entities must comply with these standards in order to become registered (to the extent that they can, see paragraph 5.19), and to remain entitled to be registered. *[Subsection 45-5(2)]*

5.31 The Governor-General may make regulations establishing governance standards. *[Subsection 45-10(1)]*

5.32 These standards must by prospective see subsection 12(2) of the *Legislative Instruments Act 2003*.

5.33 The standards can introduce principles that an entity must meet about such things as:

ensuring that its governing rules provide for a specified matter;

acting, or not acting, in a specified manner; or

establishing and maintaining processes for the purpose of ensuring certain matters,

in order to be and to remain entitled to be registered.

*[Subsection 45-10(2)]*

5.34 To be registered, most entities will be required to meet (both initially, to the extent that they can, and on an ongoing basis) the governance standards established in the regulations — see Chapter 3 — Registration.

5.35 There may be standards that do not apply to specified kinds of registered entity. *[Subsection 45-10(3)]*

5.36 The governance standards will not apply to entities that are basic religious charities (see Chapter 13 — Miscellaneous for a definition of ‘basic religious charity’). *[Subsection 45-10(5)]*

5.37 In addition, there may also be specific governance standards that apply differently to different groups of entities (such as those with members or Indigenous charities). *[Subsection 45-10(4)]*

5.38 This could include the regulations requiring members of certain bodies to meet sector developed codes of conduct. In such a case, a prescribed sector developed code of conduct would be binding only on those members of an association or organisation that are signatories to the code, and a breach of the prescribed sector developed code of conduct would be a breach of the ACNC Bill. By allowing for the adoption of sector developed codes of conduct, the Government can utilise a co-regulatory model of governance where the sector is interested in developing such an approach.

5.39 Further, the ACNC Commissioner can endorse other codes of conduct, for entities who are members of certain bodies, as meeting the requirements of the governance standards.

5.40 The governance standards will ensure a minimum level of accountability across the sector.

5.41 If an entity is meeting the governance and external conduct requirements as established in the regulations, it does not mean that they are meeting best practice governance outcomes (although they may be).

5.42 The governance standards will give members, donors and volunteers of registered entities, and the rest of the public, confidence that a registered entity is operating openly, accountably and transparently, for its stated purpose, and in an effective and efficient manner, and is minimising the risk of mismanagement and misappropriation.

*[Subsection 45-5(1)]*

#### *Satisfying the standards*

5.43 The standards are expected to be principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation.

5.44 The implications of the governance standards are expected to vary according to the circumstances of a particular registered entity.

5.45 Registered entities cannot choose whether to meet the standards in the regulations, but they can choose how they meet the standards, taking into account their specific situation.

5.46 In deciding what processes are reasonable for the entity to implement to satisfy the requirements, the registered entity would consider its size, the extent to which it receives donations, grants and other monies from governments or the public, the number of beneficiaries and the potential impact on them.

5.47 What a large entity must implement to satisfy the requirements will be different from what a small entity must do to satisfy the same requirements.

5.48 The larger an entity, and the more public monies it receives, the higher the community expectation that the entity is operating efficiently, effectively and consistently with its stated purposes, and therefore the more the entity can be expected to do to meet that expectation.

5.49 Smaller entities are not expected to be less transparent; however, their smaller nature usually means the risk of misuse of funds would be less than for a larger entity.

5.50 A smaller entity would usually have a smaller risk of funds being mismanaged or misappropriated, as both the value and the volume of transactions would usually be less, and the members would usually be running the entity. As such, the processes the entity would need to implement to safeguard against mismanagement and to operate openly and transparently would typically be less.

5.51 In addition, smaller entities will often have more limited resources to develop detailed and prescriptive governance policies.

5.52 The ACNC Commissioner will release guidance material to assist entities to determine how to comply with the governance standards.

#### ***External conduct standards***

5.53 The Bill sets up a framework for a set of principle-based minimum external conduct standards applying to all registered entities, regardless of entity type, to regulate funds sent by registered entities outside Australia, and activities engaged in by these entities outside Australia. Registered entities must comply with these standards in order to become registered (to the extent that they can, see paragraph 5.19), and to remain entitled to be registered. [*Subsection 50-5(2)*]

5.54 The Governor-General may make regulations establishing external conduct standards. [*Subsection 50-10(1)*]

5.55 The standards can introduce principles that an entity must meet about such things as:

ensuring that its governing rules provide for a specified matter;

acting, or not acting, in a specified manner; or

establishing and maintaining processes for the purpose of ensuring certain matters,

in order to be and to remain entitled to be registered.

*[Subsection 50-10(2)]*

5.56 The external conduct standards can only relate to matters that are external to Australia, or to matters that are not external to Australia but that are closely related to, or have or will have a significant impact on, entities, things or matters outside Australia. *[Subsection 50-10(3)]*

5.57 Australian NFP entities in the past have sometimes provided support for terrorist and other criminal activities. Often they did so unknowingly but occasionally did so deliberately, whether to directly help the organisations conducting those illegal activities or as a means to achieving their legitimate charitable ends.

5.58 The purpose of these external conduct standards is to prevent Australian registered entities providing support 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). *[Subsection 50-5(1)]*

5.59 The external conduct standards are expected to be based on the requirements of the Financial Action Task Force's (FATF) Special Recommendation VIII (SR VIII), and help combat the terrorist and criminal activities covered in the FATF recommendation

5.60 The FATF is an inter-governmental body established in 1989 to promote measures for combatting money laundering, terrorist financing and related threats to the integrity of the international financial system.

5.61 As a member of the FATF, Australia has agreed to comply with the FATF recommendations.

5.62 FATF SR VIII requires FATF members to 'combat the misuse of NPOs (nonprofit organisations, that is, NFP entities) for the purpose of terrorism financing'. In FATF's last review of Australia's progress in 2005, it found that Australia was only partially compliant with SR VIII.

5.63 Protecting the NFP sector from misuse by terrorist organisations is both a critical component of the global fight against terrorism and a necessary step to preserving the integrity of Australia's NFP sector.

5.64 The NFP sector enjoys the trust of the public and has access to a considerable source of funds. Some entities have a global presence that provides a framework for national and international operations and financial transactions, often within or near areas that are highly exposed to terrorist activity.

5.65 Depending on the legal form of the entity and the country they are operating in, entities may be subject to little or no governmental oversight of their overseas activities. There may also be few formalities required for their creation (for example, there may be no skills or starting capital required, and no background checks necessary for employees).

5.66 Terrorist organisations may take advantage of these characteristics to infiltrate the NFP sector and misuse funds and operations to provide cover for or support of terrorist activities. Other criminal organisations can also use NFP entities for similar purposes. The FATF recommendation covers both these situations.

5.67 The external conduct 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.

5.68 Systems that promote a high degree of transparency, integrity and public confidence in the management and functioning of all NFP entities are integral to ensuring the sector cannot be misused for terrorist financing.

5.69 Similar to the governance standards, the external conduct standards are expected to be principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation. What a large entity must implement to satisfy the requirements will be different from what a small entity must do to satisfy the same requirements.

5.70 In deciding what processes are reasonable, the registered entity should consider not only its size (see paragraphs 5.46 and 5.51), but also the extent to which it receives donations, grants and other monies from the public (directly or via their governments), the number of beneficiaries and the potential impact on them.

## **Non-compliance with the governance standards and external conduct standards**

### *Governance standards*

5.71 Compliance with the governance standards is a condition of registration.

5.72 Prolonged non-compliance with a governance standard may result in the ACNC Commissioner revoking the registration of the entity — see Chapter 3 — Registration.

5.73 The ACNC Commissioner’s education and guidance will assist registered entities to understand and comply with their obligations under this Bill. Prior to revoking an entity’s registration, the ACNC Commissioner would be expected to assist the entity in complying with the standard. Revocation of registration is expected to be a last resort outcome.

5.74 However, where enforcement action is required the ACNC Commissioner has a range of enforcement powers, including the power to issue directions, so that the ACNC Commissioner can provide a proportionate and effective regulatory response. The type of enforcement power used by the ACNC Commissioner will ultimately depend on the seriousness of the situation and the particular circumstance that the ACNC Commissioner is addressing.

5.75 If a non-complying entity is a federally regulated entity (see Chapter 9 — Education, compliance and enforcement for the definition of ‘federally regulated entity’), the ACNC Commissioner may issue a warning notice or direction to the entity if the ACNC Commissioner considers that the entity is not meeting the governance standards.

5.76 For example, the ACNC Commissioner may suspend a director if the ACNC Commissioner has reason to believe the entity has not complied with the governance standards, and the removal of that director is necessary to address the breach.

5.77 The ACNC Commissioner cannot remove or suspend a responsible entity of a basic religious charity.

5.78 See Chapter 9 — Education, compliance and enforcement for further information on the situations that the ACNC Commissioner can use these powers, and the extent of the powers.

***External conduct standards***

5.79 Compliance with the external conduct standards is a condition of registration for all registered entities.

5.80 The ACNC Commissioner may use enforcement powers (such as issuing a warning notice, injunction or suspending a director) on any entity if the ACNC Commissioner considers that that an entity is not meeting the external governance standards (except to remove or suspend the responsible entity of a basic religious charity). This is different to the governance standards, where the ACNC Commissioner may only use the enforcement powers if the non-complying entity is a federally regulated entity.

5.81 See Chapter 9 — Education, compliance and enforcement for further information on the situations that the ACNC Commissioner can use these powers, and the extent of the powers.





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## **Chapter 6**

### ***Reporting and record keeping***

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#### **Outline of chapter**

- 6.1 This Chapter outlines a new ‘report-once, use-often’ general reporting framework for registered entities.
- 6.2 This Chapter explains:
- the record keeping obligations of registered entities; and
  - the reporting requirements that apply to registered entities.

#### **Summary of new law**

- 6.3 ACNC will be responsible for regulating charities from 1 October 2012. One element of this is a new general reporting framework.
- 6.4 All registered entities will be required to provide an annual information statement. The first annual information statement will be in respect of the 2012-13 financial year, and will need to be lodged with the ACNC by 31 December 2013, unless a substituted accounting period applies.
- 6.5 Only medium and large entities will be required to provide annual financial reports to the ACNC. Large entities will be required to have their financial reports audited, while medium entities can choose to either have a review or an audit.
- 6.6 The proposed framework will strike a balance between minimising the compliance burden placed on registered entities, while ensuring appropriate accountability and transparency.
- 6.7 The Government will consult further on the content requirements of financial reports and implement these through regulations. Registered entities will be required to prepare their first financial reports for the 2013-14 financial year, with the first financial reports due by 31 December 2014, unless a substituted accounting period applies.

## **Detailed explanation of new law**

### **Reporting requirements for registered entities**

#### ***Record-keeping***

6.8 Registered entities are required to keep records that correctly record and explain its transactions, and the financial position and performance of the entity. *[Subsection 55-5(1)]*

6.9 These records must be thorough enough to enable true and fair financial statements to be prepared and audited. *[Paragraph 55-5(1)(b)]*

6.10 Registered entities must also keep records that correctly record its operations. *[Subsection 55-5(2)]*

6.11 These records must enable a proper assessment of the entity's:

- entitlement to be, and to remain, registered as a type or sub-type. This assessment is undertaken by the Australian ACNC Commissioner;
- the entity's compliance with the Bill and regulations. This assessment is undertaken by the ACNC Commissioner; and
- compliance with any taxation law. This assessment is undertaken by the Commissioner of Taxation.

6.12 This assessment is known as a recognised assessment activity. The requirements in the Bill that entities keep records, and report on the basis of these records, are to enable such assessments to be conducted. *[Section 55-10]*

6.13 In undertaking such an assessment, the ACNC Commissioner will assess the adequacy of records maintained to enable an assessment of compliance with any taxation law. However, the ACNC Commissioner is not required to assess compliance with any taxation law, as this function will continue to be performed by the Commissioner of Taxation.

6.14 The records must be in English, or readily accessible and easily convertible into English. That is, if the records are not in written form (for example, if they are in an electronic medium such as a computer disc or USB), they must be in a form which is readily accessible and convertible into English by way of a computer program. *[Subsection 55-5(3)]*

6.15 This allows registered entities to store their records electronically.

6.16 Entities should ensure the conversion of electronic records to a compatible format when upgrading or changing data-processing capabilities.

6.17 These records must be retained by the entity for seven years after the transactions, operations or acts covered by the records are completed (unless the ACNC Commissioner notifies the entity that they do not need to retain their records). *[Subsections 55-5(4) and (5)]*

6.18 Failure of the entity to maintain and keep adequate records constitutes an offence by the registered entity, and carries a penalty of 20 penalty units. *[Subsection 55-5(6)]*

6.19 The offence is one of strict liability. Strict liability is the legal responsibility for damages, or injury, even if the person found strictly liable was not at fault or negligent. *[Subsection 55-5(7)]*

6.20 The use of strict liability for penalties is consistent with the Commonwealth guide for framing offences. Strict liability penalties provide a strong incentive to adopt measures to comply with the requirements. In this case, imposing strict liability is an effective way of ensuring compliance with an obligation to keep financial records.

6.21 The penalty of 20 penalty units is comparatively low when compared to penalties imposed on for-profit entities for similar offences.

6.22 Twenty penalty units currently equates to \$2,200.

***Proportional reporting requirements – revenue thresholds***

6.23 In order to minimise the compliance burden placed on registered entities, reporting requirements under the Bill are proportional to the size of registered entities, based on a revenue threshold. There are three tiers for small, medium and large entities.

6.24 A small registered entity is an entity with annual revenue of less than \$250,000. *[Subsection 205-25(1)]*

6.25 A medium registered entity is an entity with annual revenue of less than \$1 million that is not a small registered entity. *[Subsection 205-25(2)]*

6.26 A large registered entity is an entity with annual revenue of \$1 million or more. *[Subsection 205-25(3)]*

6.27 Revenue is calculated in accordance with the relevant accounting standards issued by the Australian Accounting Standards

Board [subsection 205-25(4)]. More information on the accounting standards can be found at [www.aasb.gov.au](http://www.aasb.gov.au).

6.28 The ACNC Commissioner has the discretion to treat an entity as either small, medium or large for a financial year. [Subsection 205-25(5)]

6.29 To exercise this discretion the ACNC Commissioner must be of the opinion that the entity, while not that size for one financial year, has been that size in the past, and is likely to return to that size in following financial years.

6.30 This allows the ACNC Commissioner to take a flexible approach, where, for example, a one-off financial event would require an entity to meet the reporting requirements of a higher tier for a single year. This ensures that an unnecessary compliance burden is not placed on registered entities.

#### Example 6.1

For the past ten years the Food Fabulous Foundation has had annual revenue of between \$400,000 and \$500,000 per year, and as such has reported as a medium entity every year.

The Foundation receives a bequest of \$900,000 in one financial year, meaning that it would fall under the definition of a large entity for that year.

Under these rules, the ACNC Commissioner may exercise his or her discretion and allow Food Fabulous to report in line with the requirements for a medium entity for that year, including having its report reviewed rather than audited.

In the following financial year the Foundation has annual revenue of \$415,000 and reports as a medium entity.

#### ***Information statements***

6.31 NFP entities generally operate for a broad public benefit, and are relied on by many Australians, often by those individuals who are the most vulnerable in our community.

6.32 NFPs play a unique role in Australia, and as a result are funded by governments, both directly and indirectly, and by donations from members of the public. This unique role means that governments often afford them special treatment by way of exemptions, concessions and benefits from a range of laws and fees.

6.33 It is therefore appropriate that registered entities have some level of accountability to the public and meet community expectations about the behaviour of entities in receipt of public monies and support.

6.34 All registered entities will be required to provide the ACNC Commissioner with an information statement for each financial year [Subsection 60-5(1)]. The first annual information statement will be in respect of the 2012-13 financial year, and will need to be lodged with the ACNC by 31 December 2013, unless a substituted accounting period applies (further information on substituted accounting periods is provided below).

6.35 The information will be used to carry out recognised assessment activities, including whether entities remain entitled to be registered by the ACNC, and can continue to access exemptions, concessions and other benefits for which registration is a necessary pre-condition (for example, tax concessions).

6.36 Information statements must be submitted in the approved form. This means that the ACNC Commissioner can decide what information needs to be provided and the way it needs to be provided. [Section 60-5]

6.37 The ACNC can be expected to require information relating to such things as governance, finances, activities, purposes, objects and beneficiaries of the registered entity.

6.38 The information statement may be proportional, with the ACNC Commissioner able to approve different forms for small, medium and large registered entities. [Subsection 60-5(1)(note)]

6.39 The information statement must be prepared and lodged with the ACNC Commissioner no later than six months after the registered entity's reporting year. This requirement aligns with the maximum times for lodgement of such reports under existing NFP regulation, to facilitate a smooth transition for charities to the ACNC. The ACNC Commissioner may defer the lodgement date if the circumstances require it. [Subsection 60-5(2) and section 190-15]

6.40 Failure to provide an information statement to the ACNC Commissioner by the due date may result in administrative penalties being applied to the entity. Administrative penalties are explained in detail in Chapter 13 — Miscellaneous.

6.41 Information statements submitted by registered entities will be available to the public, except for those parts that are classified as 'not for publication' in the approved form [paragraph 40-5(1)(d)]. The publication of

the information statements will assist in increasing transparency of the sector's operations and activities.

6.42 To ensure the ACNC is able to fulfil its role to act as a 'one-stop shop' regulator and to support transparency and accountability for the NFP sector, disclosure of information held by the ACNC is permitted in certain circumstances where authorised under the secrecy framework in Part 7-1 of the Bill.

6.43 Under the secrecy framework, an ACNC officer is prohibited from disclosing any personal information except where consent is given by the responsible entity to which the information relates or where the disclosure is for the purpose of including it on the ACN Register and it is necessary to achieve the objects of the Bill.

6.44 The Bill provides a comprehensive secrecy regime to ensure that the ACNC appropriately manages the information provided to it. For further information on protected information, secrecy and disclosure of information, see Chapter 11.

6.45 If a large or medium registered entity identifies a material error in its information statement, it must give the ACNC Commissioner a corrected statement within 28 days of the error being identified.  
*[Subsections 60-65(1) and (2)]*

6.46 If a small registered entity identifies a material error in its information statement, it must give the ACNC Commissioner a corrected statement within 60 days of the error being identified. *[Subsections 60-65(1) and (2)]*

6.47 Failure to re-lodge an information statement within the required time period may result in administrative penalties being applied to the entity.

6.48 This ensures that the public and the ACNC have access to the latest and most accurate information and ensures the protection and enhancement of public confidence and trust.

### ***Annual financial reports***

6.49 In addition to the annual information statement, medium and large registered entities must prepare and submit an annual financial report. *[Section 60-10]*

6.50 This is not a mandatory requirement for a basic religious charity (see Chapter 13 for the definition of basic religious charity). However, if a basic religious charity chooses to lodge a financial report, it must

comply with Subdivision 60-C and any associated regulations.  
*[Section 60-60]*

6.51 The financial report must comply with the content requirements in the regulations. *[Subsection 60-15(1)]*

6.52 The regulations will be the subject of further consultation. The regulations may provide that, in most cases, the financial report will be based on accounting standards issued by the Australian Accounting Standards Board (AASB), although as noted above, these requirements will be finalised following further consultation.

6.53 Financial reports must be prepared and lodged with the ACNC Commissioner no later than six months following the end of the entity's reporting year. *[Subsection 60-10(2)]*

6.54 The ACNC Commissioner has the discretion to extend this period. *[Subsection 60-10(2)]*

#### ***Substituted accounting periods***

6.55 The ACNC Commissioner may approve a substituted accounting period, in lieu of a financial year ending 30 June, for a registered entity. *[Section 60-85]*

6.56 Entities that want to seek approval from the ACNC Commissioner to report using a substituted accounting period must apply in the approved form. *[Subsection 60-85(3)]*

6.57 Entities that notify the ACNC Commissioner, within six months of the commencement date, that they currently report under an Australian law for a period other than a financial year ending 30 June, will be taken to have been approved by the ACNC Commissioner (on an ongoing basis) to lodge their financial report to the ACNC on the basis of that other period. That is, existing substituted accounting periods will be grandfathered for such entities, and the ACNC Commissioner's approval to adopt the alternate accounting period will not be required in these cases. For further information, see Chapter 14 — Transitional provisions.

6.58 Registered entities which report using a substituted accounting period will still report annually. Instead of 31 December, these entities will be required to provide their financial reports to the ACNC Commissioner six months after the last day of their accounting period.  
*[Subsection 60-85(2)]*

6.59 To ensure a smooth transition from one accounting period to another, the ACNC Commissioner has the power to impose any conditions that are necessary for this transition. *[Subsection 60-90]*

***Mistakes and errors in information statements and financial reports***

6.60 If a registered entity identifies a material error in their financial report, the registered entity must supply the ACNC Commissioner with a corrected report within 28 days of the error being identified. *[Section 60-65]*

6.61 This ensures that the information within the public domain is up-to-date and accurate, and reflects the true position of the entity. This will help promote public confidence and trust in sector.

6.62 Failure to re-lodge a corrected financial report within the required time period may result in administrative penalties being applied to the entity. Administrative penalties are explained in Chapter 13 - Miscellaneous provisions.

6.63 This ensures that the public and the ACNC have access to the latest and most accurate information.

***Additional reporting requirements where ACNC Commissioner requires***

6.64 The ACNC Commissioner has the authority to require a registered entity, or a class of registered entities, to provide additional information in the financial report or information statement, and to lodge additional reports, by making a written determination. *[Subdivision 60-E]*

6.65 Any such reports would be used by the ACNC to meet any information requirements that extend beyond the information contained in the financial report or the annual information statement. This type of additional reporting will only be used where necessary, for example, where there is reason to believe that a registered entity has contravened the Bill.

6.66 The ACNC Commissioner must set out the additional information or requirements. *[Sections 60-75 and 60-80]*

6.67 The information requested may be in relation to past or future periods, but may not relate to a period more than six years ago. *[Subsections 60-75(6) and 60-80(6)]*

6.68 Depending on the circumstances, the additional report or information sought by the ACNC Commissioner may diverge from particular accounting standards. In such cases, the regulations may require registered entities to apply all relevant accounting standards,



except for any that are inconsistent with the ACNC Commissioner's determination. However, as noted above, this will be subject to further consultation.

6.69 The ACNC Commissioner's power to require additional information applies to basic religious charities, consistent with existing obligations under the tax law to provide the Commissioner of Taxation with additional information.

### Collective and joint reporting

6.70 The Bill provides the ACNC Commissioner with discretion to allow entities to provide collective or joint reports, in certain circumstances. *[Section 60-95]*

6.71 Two or more entities which provide either joint or collective reports are known as a **reporting group**. *[Section 60-95]*

6.72 A reporting group may lodge a single information statement, and if required, a single financial report for a financial year. This is referred to as **joint reporting**. *[Subsection 60-95(1)]*

6.73 A reporting group may also prepare one or more information statements, and if required, financial reports for a financial year, on a basis other than an entity-by-entity basis. This is referred to as **collective reporting**. *[Subsection 60-95(2)]*

6.74 This will allow, for example, reporting along certain lines of activity, rather than on an entity-by-entity basis, where the ACNC Commissioner approves such reporting.

6.75 For instance, the ACNC Commissioner could authorise a group of related entities which are engaged in two distinct types of charitable work to report based on the type of activities that they undertake. *[Section 60-95(2)]*

6.76 Entities can seek the ACNC Commissioner's approval, in the approved form, to prepare collective or joint reports. *[Subsection 60-95(3)]*

6.77 Before making a decision to allow registered entities to report as a reporting group the ACNC Commissioner must consider a list of factors in order to ensure that the reporting group will represent the most appropriate form of report and will meet the needs of all users, including the public, the entities and regulators. *[Subsection 60-95(4)]*

6.78 In deciding whether to allow two or more registered entities to form a reporting group, the ACNC Commissioner must consider:

- how the public interest in the transparency and accountability of the registered entities is best served, including the possible effect on:
  - the public’s understanding of the activities of the registered entities and the information provided in the information statement or financial report; and
  - the public’s ability to rely upon the information provided in the information statement or financial report;
- how the altered reporting arrangements would affect the ACNC Commissioner’s ability to conduct recognised assessment activities;
- whether members of the reporting group have access to the same or different taxation concessions;
- how the altered reporting arrangements may affect the Commissioner of Taxation’s ability to assess the registered entity’s compliance with taxation laws;
- the possible effect on the compliance and administrative costs of registered entities proposed to be included in the reporting group;
- the degree of the affiliation, control and proximity of registered entities proposed to be included in the reporting group;
- the objects of the Bill; and
- any other matter that the ACNC Commissioner considers relevant.

*[Subsection 60-95(4)]*

6.79 In making a decision to allow registered entities to form a reporting group the ACNC Commissioner must consider all of these factors.

6.80 This assessment could involve weighing competing considerations. For instance, the ACNC Commissioner may believe that allowing closely related entities with similar purposes to form a reporting group would best serve the public interest in accountability and transparency and would allow recognised assessment activities to be undertaken. On the other hand, the entities may access different taxation

concessions and allowing the entities to form a reporting group may reduce transparency and increase compliance costs for the entities.

6.81 Furthermore, in a case where a group of closely related, centrally controlled entities which all access the same tax concessions wish to form a reporting group, and this consolidation would be expected to reduce compliance costs, the ACNC Commissioner may refuse to grant this request if allowing the entities to form a reporting group might allow the registered entities to reduce transparency and accountability, particularly in relation to public understanding of the activities of the entities.

6.82 In considering the degree of affiliation, control and proximity of registered entities proposed to be included in a reporting group the ACNC Commissioner would consider such factors as the extent to which the group acts like a group, how they interact together and how close each of their activities are to one another. *[Paragraph 60-95(4)(f)]*

#### Example 6.2 **An entity that is unlikely to be approved**

Youth Help is a youth development organisation that operates in NSW and Victoria. Its purpose is to advance the education of disadvantaged youth and to reduce youth unemployment and crime. The organisation operates in 20 branches in locations with high numbers of disadvantaged youths across NSW and Victoria.

The central branch of Youth Help is located in Melbourne and has a high level of affiliation with each of the other branches. There is one common binding set of governing rules.

However, each branch is able to make decisions about its own day to day activities, structure and management, in keeping with the overall purpose of Youth Help.

Each branch receives different tax concessions from the Commonwealth Government in recognition of their various NFP activities.

One branch of Youth Help operates a band night each Friday night to provide a place for youths to go at night, and to raise funds for its other activities. Local businesses and individuals donate food, time and services for the band nights, and the branch uses the Band Nights to run raffles to raise funds for its other activities. The Band Nights are well attended by the local community.

Another branch of Youth Help runs an op-shop to sell donated clothes, books and furniture. It uses the funds raised from selling donated goods to provide on the job training to disadvantaged youths.

One of the branches of Youth Help donates funds to an overseas youth development organisation using monies collected from youth group attendees.

Seven branches of Youth Help are registered as public benevolent institutions and hold DGR status for their youth development activities.

Another branch of Youth Help receives large sums of money from a testamentary trust set up by the mother of a child who benefitted from their help in the past. The branch receives money from the trust on a quarterly basis and the letter of wishes states that the funds are to be used only for the activities of that particular branch of Youth Help.

In considering whether to approve collective reporting in this case, the ACNC Commissioner would have regard to that fact that the organisation is in receipt of large amounts of public monies from its multiple and varied fundraising activities, and donations from the testamentary trust. This indicates that a high level of accountability and transparency to the public is necessary.

The ACNC Commissioner would also have regard to the fact that while the governing rules are held at the central branch level, each branch has decision making authority and is responsible for the management of day — to — day activities.

The ACNC Commissioner would also have regard to the fact that one branch of the organisation sends money overseas.

These factors together mean that Youth Help may not be approved for collective reporting.

6.83 The Bill does not prevent a representative member of the reporting group from lodging the report or statement on behalf of the reporting group. However, the obligation will still remain on each individual entity to comply with their reporting obligations. This ensures that registered entities do not attempt to use grouping arrangements to avoid individual responsibilities.

6.84 A failure to comply with the reporting requirements could result in the imposition of administrative penalties for each entity that fails to report in the reporting group. However, the ACNC Commissioner is likely to use their discretion to not impose multiple penalties in such cases, unless the circumstances dictate that as an appropriate response.

### **Example 6.3 An entity that is likely to be approved**

The Red Hat Trust is a youth development organisation that operates in NSW and Queensland. Its purpose is to advance the education of disadvantaged youths and to reduce youth unemployment and crime.

The organisation operates in 20 branches in locations with high numbers of disadvantaged youths across NSW and Queensland.

The central branch of Red Hat Trust is located in Brisbane and has a high level of affiliation with each of the other branches. The central branch holds the documents that govern the whole organisation. The central branch is responsible for the day-to-day management and decision making for each branch.

Half of the branches are registered as public benevolent institutions. As such, they have DGR status and access to tax concessions such as FBT exemptions and income tax exemptions. The other half of the branches receive different charitable tax concessions.

Five branches of The Red Hat Trust operate single store op-shops to raise funds from the sale of books, clothes and used furniture.

In considering whether to approve collective reporting in this case, the ACNC Commissioner would have regard to common fundraising, accounting and reporting practices of Red Hat Trust.

The ACNC Commissioner would further note that the central branch has decision making power over each of the 20 branches.

The ACNC Commissioner would also consider the common purpose of the organisations and the lack of complexity of financial arrangements which could create a lack of transparency.

These factors together mean that Red Hat Trust may be approved for collective reporting.

6.85 Depending on the circumstances, joint and collective reporting may diverge from particular accounting standards, such as accounting standard AASB 10 *Consolidated Financial Statements*. In such cases, the regulations may require registered entities to apply all relevant accounting standards, except for those which are inconsistent with this type of reporting. However, as noted above, this will be the subject of further consultation.

6.86 The relevant reporting tier that should be applied to joint and collective reports is the tier applying to the largest registered entity that is included in the reporting group. [Section 60-105]

6.87 For example, if a small and medium entity combine to form a reporting group which is considered large, then the joint report can be prepared on the basis of the medium tier requirements (that is, they would be permitted to have a review rather than an audit).

6.88 Continuing with this example, if the large combined entity seeks to disaggregate into five entities that would each be considered small, and prepare five collective reports, each collective report would be prepared on the basis of the medium tier requirements, as this is the tier applying to the largest entity that is included to form the reporting group. This will ensure that entities cannot avoid their reporting obligations by disaggregating into smaller entities that would otherwise be exempt from reporting due to their size.

6.89 Where the ACNC Commissioner approves a request to allow registered entities to form a reporting group the ACNC Commissioner may impose conditions on members of the reporting group. *[Section 60-100]*

6.90 For example, the ACNC Commissioner may impose a condition that certain items be separately identified or explained in the financial reports and notes to the financial reports. *[Paragraphs 60-100(3)(a) and (b)]*

6.91 The ACNC Commissioner may also impose conditions relating to the structure of financial reports. *[Paragraph 60-100(3)(c)]*

6.92 For example, the ACNC Commissioner may require certain matters, such as the donations received by a DGR which is a member of the reporting group, to be separately reported.

## **Audits and reviews**

6.93 Large entities must have their financial report audited and obtain an auditor's report. *[Section 60-25]*

6.94 Medium entities can choose to have their financial report reviewed, instead of being audited, unless they are expressly directed by the ACNC Commissioner to have their financial report audited. *[Section 60-20]*

6.95 The ACNC Commissioner would only be expected to direct a medium entity to have their financial report audited in particular cases, for example, where there had been previous problems or non-compliance by the entity.

6.96 A review, in contrast to an audit, is not designed to provide assurance that the financial information reported by the entity is free from material misstatement.

6.97 A review consists of making enquiries, primarily of individuals responsible for financial and accounting matters, and applying analytical and other review procedures. In contrast, an audit requires undertaking

audit procedures, in order to detect material misstatements and carry out specific procedures to reduce fraud risk.

6.98 A review may bring significant matters affecting the financial information to the assurance individual's attention, but it does not provide all of the evidence that would be required in an audit.

6.99 The objective of an audit of a financial report is to enable the auditor to express an opinion on whether the financial report is prepared, in all material respects, in accordance with an applicable financial reporting framework. When forming an opinion on the financial report the auditor needs to evaluate whether, based on the audit evidence obtained, there is reasonable assurance about whether the financial report taken as a whole is free from material misstatement.

6.100 An audit must be undertaken by a 'registered company auditor', an audit firm or an authorised audit company, within the meaning of the *Corporations Act 2001*. [Subsection 60-30(1)]

6.101 The regulations may also prescribe other entities that can undertake an audit. [Paragraph 60-30(1)(d)]

6.102 However, reviews can be performed by a wider class of individuals. In addition to registered company auditors, audit firms and authorised audit companies, a member of a professional body may conduct a review provided they hold the relevant designation of that professional body [subsection 60-30(2)]. These designations will be prescribed by the *Corporations Regulations 2001*.

6.103 For example, a member of the Institute of Chartered Accountants (CA) in Australia must have CA designation to perform a review of a registered entity. Similarly, a member of Certified Practising Accountants Australia (CPA Australia) must have CPA designation.

6.104 This effectively allows a broad class of individuals to undertake reviews with some limitations to ensure that reviewers are subject to appropriate professional standards.

6.105 In practice this means that a reviewer must be a member of a professional accounting body who is not a student member and who is subject to certain minimum standards, such as continuous professional development, in line with the requirements of the professional accounting bodies.

6.106 The audit report or review report must contain a statement from the auditor or reviewer which provides their opinion or conclusion about

certain key matters. The auditor or reviewer must form an opinion (in the case of an audit) or conclusion (in the case of a review) about whether:

- in the case of an audit, the financial report meets all the requirements in the Bill *[subsections 60-30(3) and (4)]*;
- in the case of a review, anything has come to the reviewer's attention that causes the reviewer to believe that the financial report does not meet all the requirements in the Bill *[subsections 60-30(3) and (4)]*; and
- all information, explanation and assistance necessary for the conduct of the audit or review has been provided *[subsections 60-30(3) and (4)]*; and
- the registered entity has kept sufficient financial records for a financial report to be prepared and audited *[subsections 60-30(3) and (4)]*; and
- the registered entity has kept other records as required by the reporting requirements in the Bill *[subsections 60-30(3) and (4)]*.

6.107 The audit or review must be conducted in accordance with auditing standards. *[Section 60-35]*

6.108 A registered entity must obtain from its auditor or reviewer:

- a written, signed, declaration to the responsible entities of the registered entity stating that, to the best of their knowledge, there have been no contraventions of any applicable code of professional conduct in relation to the audit or review; or
- a written, signed, declaration to the responsible entities of the registered entity stating that, to the best of their knowledge, the only contraventions of any applicable code of professional conduct in relation to the audit or review are those detailed in the signed declaration.

*[Section 60-40]*

6.109 This ensures the audit or review is prepared without bias, conflict of interest, or the undue influence of others, and allows the public to have faith that the audit has been done to a high objective standard.

6.110 An explanation must be given if the auditor or reviewer does not believe that the financial report is in accordance with Division 60 of the Bill. The auditor's report or reviewer's report must quantify the effect



that non-compliance has on the financial report. If quantifying the effect is not possible, the report must explain why. *[Sections 60-45 and 60-50]*

6.111 The auditor's report or the reviewer's report must describe any material defects or irregularities in the financial report, and any deficiencies, failures or shortcomings in respect of:

- whether the auditor has been given all information, explanation and assistance necessary for the conduct of the audit or review;
- whether the registered entity has kept financial records sufficient to enable a financial report to be prepared and audited; and
- whether the registered entity has kept the other records required by the Bill.

*[Subsections 60-45(3) and 60-50(3)]*

6.112 The auditor's report or reviewer's report is also required to include any statements or disclosures that the auditing standards require. *[Subsections 60-45(4) and 60-50(4)]*

6.113 A registered entity must ensure that the auditor or reviewer has access to and is given all information that is reasonably requested. *[Section 60-55]*

6.114 Further information on auditing requirements can be found at the Auditing and Assurance Standards Board website at [www.auasb.gov.au](http://www.auasb.gov.au).



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## **Chapter 7**

### ***Duty to notify***

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#### **Outline of chapter**

7.1 This Chapter explains the obligations of entities to notify the Australian Charities and Not-for-profits Commission (ACNC) Commissioner (ACNC Commissioner) of certain matters.

#### **Summary of new law**

7.2 The new law requires registered entities to notify the ACNC Commissioner of certain matters, in particular certain changes to the entity's details or matters that may affect its entitlement to registration.

7.3 In order to ensure that the ACNC Commissioner and public are informed of those matters which may affect an entity's entitlement to registration it is necessary that the ACNC Commissioner is informed of certain changes to registered entities.

7.4 The duty to notify the ACNC Commissioner of certain matters is also important to ensure that the information about entities that is displayed on the ACN Register is accurate and up to date. Having the register accurate and up-to-date is necessary for the public to be able to rely on that information when making decisions.

7.5 Registered entities with similar obligations to notify other Commonwealth Government agencies of some information will no longer be required to notify those other agencies, for example, the ATO or the ASIC.

#### **Detailed explanation of new law**

##### **Certain matters must be notified to the ACNC Commissioner**

7.6 Registered entities have a duty to notify the ACNC Commissioner of certain matters. *[Section 65-5]*

***Changes to entity information***

7.7 A registered entity must notify the ACNC Commissioner, in the approved form, if the entity changes its name or address for service. *[Paragraphs 65-5(1)(a) and (b)]*

7.8 A registered entity must notify the ACNC Commissioner, in the approved form, if an entity has ceased to be, or has become, a responsible entity of the registered entity. *[Paragraph 65-5(1)(c)]*

7.9 This ensures that the details of the entity and contact details are current so that the ACN Register reflects the correct names of entities and that the ACNC Commissioner can contact registered entities or serve documents on them knowing that those documents will be received by the entity.

7.10 Keeping this information up-to-date also ensures that registered entities can receive documents and meet their regulatory obligations under the Bill.

7.11 A registered entity must notify the ACNC Commissioner of a change to its governing rules. *[Paragraph 65-5(1)(d)]*

7.12 If a group of entities make changes to a common set of governing rules, it is sufficient that the ACNC Commissioner is notified by one of the entities of the changes affecting them all.

7.13 The Bill allows the ACNC Commissioner to approve a form allowing one authorised entity to notify of changes on behalf of all entities in a ‘group’.

7.14 However, notifying as a group does not mitigate the responsibility of each entity to notify the ACNC Commissioner of certain matters. That is to say, if the authorised entity fails to notify on behalf of the group, each entity in the group is responsible for failing to notify the ACNC. This ensures that registered entities do not attempt to use grouping arrangements to avoid individual responsibilities.

7.15 However, the ACNC Commissioner is likely to use their discretion to not impose multiple penalties in such cases, unless the circumstances dictate that as an appropriate response.

***Other matters for which a duty to notify arises***

7.16 Registered entities must notify the ACNC Commissioner of any fact or circumstance that may affect their entitlement to registration as a type or as a subtype of entity. *[Subsection 65-5(2) and paragraph 65-5(1)(e)]*

### Example 7.1

The Gauge organisation has changed its activities and is no longer entitled to be registered as a charity. It does not meet the description of the relevant entity type and must notify the ACNC Commissioner of this change.

7.17 A registered entity must notify the ACNC Commissioner if it contravenes the Bill or does not comply with a governance standard or external conduct standard, and that contravention or non-compliance is significant. *[Paragraphs 65-5(2)(a) and (b)]*

7.18 A significant contravention is one that would affect an entity's entitlement to registration. *[Paragraph 65-5(2)(c)]*

### Example 7.2

The responsible entities of the Blue Glass Foundation discover that substantial funds are being sent overseas without being accounted for. The Foundation must notify the ACNC Commissioner of this matter.

7.19 There is a difference between entitlement to registration and revocation of registration. Before revoking registration the ACNC Commissioner must consider a range of factors as detailed in Chapter 3 — Registration.

7.20 The requirements for an entity to maintain registration are explained in Chapter 3 — Registration and Chapter 5 — Governance standards and external conduct standards.

7.21 In determining the significance of a contravention or non-compliance, the registered entity should consider:

- the nature, significance and persistence of any contravention or non-compliance; and
- the desirability of ensuring that contributions to the registered entity are applied consistently with the NFP nature, and the purpose of the registered entity. *[Subsection 65-5(3)]*

7.22 The meaning of the term contribution is explained in Chapter 3 — Registration.

### Example 7.3

Map It Inc, a registered entity, discovers gross errors in the entity's financial records for the previous two years. There is a risk that money

has been misapplied. This is a significant contravention of the Bill and Map It Inc must notify the ACNC Commissioner.

7.23 The matters which must be notified to the ACNC Commissioner are based on notification provisions of other Commonwealth regulators, including:

- the change of company details provisions of the *Corporations Act 2001*;
- Division 426 in Schedule 1 to the *Taxation Administration Act 1953*; and
- the breach reporting requirements of the *Banking Act 1959*.

### ***Timing***

7.24 The duty to notify arises as soon as the registered entity becomes aware of the matter. [*Section 65-5(4)*]

7.25 The entity must notify the ACNC Commissioner as soon as practicable after the registered entity first has knowledge of the matter. [*Paragraph 65-5(4)(a)*]

7.26 Entities registered as large or medium entities must give notice to the ACNC Commissioner as soon as possible, but no later than the end of 28 days. [*Paragraph 65-5(4)(b)*]

#### **Example 7.4**

Hands to Help is a medium registered entity. Hands to Help makes a change to its governing rules on 1 January 2013. Hands to Help must notify the ACNC Commissioner as soon as possible and no later than 29 January 2013.

7.27 Entities registered as small entities must give notice to the ACNC Commissioner as soon as possible, but no later than the end of 60 days for all matters except for significant contraventions of the Bill. [*Paragraph 65-5(4)(c)*]

#### **Example 7.5**

Small Helpers is a small registered entity. Small Helpers changes its name to Big Help on 1 December 2012. The entity has until the end of 60 days from 1 December 2012 to notify the ACNC Commissioner of the change. As such, the entity must notify the ACNC Commissioner by the end of 30 January 2013.

7.28 Entities registered as small entities must give notice of significant contraventions of the Bill as soon as possible, but no later than the end of 28 days. *[Paragraph 65-5(4)(b)]*

7.29 If multiple notifications arise at the same time in relation to one or more matters then only one notification of all matters needs to be made. *[Subsection 65-5(5)]*

#### Example 7.6

The Big Plan, a registered entity, moves premises and changes its name to Small Steps on the same day. The entity may give one notification that notifies the ACNC Commissioner of both changes.

7.30 The notice must be given to the ACNC Commissioner in the approved form *[Section 65-5(1)]*. The approved form rules are explained in Chapter 13 — Miscellaneous.

#### ***Incentives to notify the ACNC Commissioner early***

7.31 All registered entities must notify the ACNC Commissioner of the matters described in the sections above.

7.32 There are penalties for failing to notify the ACNC Commissioner of the matters outlined above, or for giving notice to the ACNC Commissioner late. *[note in subsection 65-5(1)]*

7.33 The administrative penalties regime is proportional and dynamic. As such, there are more severe penalties for prolonged lateness, attempts to mislead the ACNC Commissioner and for providing deliberately false information. Conversely, penalties are more lenient where an entity innocently provides incorrect information and discloses this to the ACNC. Further information can be found in Chapter 13 — Miscellaneous.

#### Example 7.7

J U Crowd Inc moves premises on 15 November 2012. J U Crowd Inc notifies the ACNC Commissioner of the change to its address for service on 10 December 2012. J U Crowd Inc has fulfilled its obligations under the Bill.

#### Example 7.8

Following on from the example above, J U Crowd does not notify the ACNC Commissioner of the change to its address for service. The ACNC Commissioner finds out that the entity's address for service has

changed on 15 January 2012. J U Crowd may be liable for an administrative penalty.

7.34 The ACNC Commissioner must consider the actions that an entity could have taken, or has taken, before undertaking any enforcement action, including revocation of registration.

7.35 The duty to notify is a part of encouraging cooperation between the ACNC Commissioner and the NFP sector. The duty to notify allows registered entities to notify the ACNC Commissioner of changes and problems, and demonstrates their willingness to take action to meet their regulatory obligations and to address contraventions and non-compliance.

7.36 In considering an appropriate response to a contravention or non-compliance with the Bill, a notification made by an entity could be used by the ACNC Commissioner as evidence of the entity's willingness and responsiveness to comply with the Bill.

#### Example 7.9

Aussies Inc is a registered entity. Liam has recently resigned from Aussies Inc and the board of Aussies Inc appoints a new responsible entity, Patrick, and notifies the ACNC Commissioner of this matter. Upon his commencement Patrick inspects the books of Aussies Inc and becomes aware of significant errors and falsifications made by Liam in Aussie Inc's financial reports. Patrick brings these matters to the attention of the board, who had no prior knowledge of the problem. The board notifies the ACNC Commissioner of the matter immediately.

The duty to notify the ACNC Commissioner arises once the entity becomes aware of the matter, regardless of the fact that the actual contravention may have occurred many months previously.

Aussies Inc has complied with its duty to notify, although there may still be administrative penalties associated with submitting earlier false financial reports.

In considering an appropriate response, the ACNC Commissioner may exercise his or her discretion to reduce the administrative penalty to nil, having taken into consideration Aussies Inc's fulfilment of their duty to notify.

#### Example 7.10

Following on from the example above, Patrick brings the matter to the board's attention, and they decide not to notify the ACNC Commissioner. The ACNC Commissioner is made aware of the matter some time later.



The entity is liable to an administrative penalty for failing to notify the ACNC Commissioner, as well as possible enforcement action for falsifying financial reports.

7.37 In considering an appropriate response to the falsification of the financial reports, the ACNC Commissioner takes the entity's failure to notify the ACNC Commissioner of the matter into consideration. The ACNC Commissioner may exercise his or her discretion to increase the administrative penalty because the responsible entities deliberately attempted to withhold information.



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## **Chapter 8**

# ***Information gathering and monitoring powers***

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### **Outline of chapter**

- 8.1 This Chapter:
- explains the information gathering and monitoring powers of the Australian Charities and Not-for-profits Commission (ACNC); and
  - sets out the scope of information that can be gathered under these powers and the circumstances in which the powers may be used.

### **Summary of new law**

8.2 The ACNC will be responsible for implementing a report-once, use-often reporting framework, providing education and support to the sector, and establishing a public information portal.

8.3 ACNC registration will be a precondition for not-for-profit (NFP) entities to access exemptions, benefits and concessions provided under Australian laws, including Australian taxation laws.

8.4 The ACNC will be responsible for assessing whether NFP governance structures and financial positions are appropriate for these entities to receive public funds.

8.5 Commonwealth government agencies that administer exemptions, benefits and concessions provided in Australian laws would no longer be required to assess the adequacy of NFP governance structures and financial position.

8.6 The ACNC will take this role over from these other Commonwealth government agencies and will therefore centralise the assessment of the adequacy of NFP governance structures and financial position.

8.7 For the NFP sector's regulatory framework to function and remain effective the ACNC needs to be able to access the latest available information through appropriate information gathering and monitoring powers.

8.8 Without these powers the ACNC would be unable to gather information beyond that contained in information statements and financial reports, and would be unable to investigate fraud and whether public funds are being used to promote charitable purposes.

8.9 The ACNC will administer a report-once, use-often reporting framework. A part of the framework will be the 'charity passport' which will be used by registered entities to meet the majority of their financial and governance reporting requirements.

8.10 Commonwealth government agencies will use information in the passport to satisfy their particular information requirements and will not be required to verify the accuracy of information. Through time it is possible that information in the charity passport could satisfy the requirements of State and Territory government agencies.

8.11 Information contained in the passport must be correct and accurate for the report-once, use-often framework to function effectively and reduce the red-tape faced by NFPs. The information gathering and monitoring power enables the Australian Charities and Not-for-profits Commission Commissioner (ACNC Commissioner) to validate the accuracy of the information contained in the passport.

8.12 Under its secrecy framework the ACNC will be able to share information with Australian government authorities where the sharing of information is reasonably necessary to promote the object of the Bill.

8.13 The ACNC will not be responsible for ensuring that product and service standards are met. However, to function effectively as a one-stop shop regulator for the sector, the ACNC will need to have appropriate powers to take samples of products or inspect items on premises with a view to sharing the information gathered with relevant authorities.

8.14 It is also critical for the legislation to contain safeguards to protect the interests of registered entities and the privacy of employees of these entities. This will be achieved by having specific conditions that are required to be satisfied prior to the ACNC using these powers.

8.15 Additionally, the scope of the powers will be limited to information that is absolutely necessary for the ACNC to administer the sector's regulatory framework.

## Information gathering and monitoring powers

8.16 The ACNC Bill provides the ACNC Commissioner with powers to gather information or request documents, search premises and inspect items on premises, and secure documents or electronic equipment found on premises.

8.17 The ACNC Commissioner can use these powers to determine whether a registered entity has complied with:

- provisions of the ACNC Bill, including provisions that create offences, or administrative penalties;
- registration conditions required to maintain ACNC registration; and
- provisions in the *Crimes Act 1914* or the *Criminal Code* that creates offences related to the ACNC Bill.

8.18 The ACNC Commissioner will also be able to use these powers to determine whether information provided by registered entities, including information required to be provided under the ACNC Bill and information provided on a voluntary basis, is correct and accurate.

8.19 These powers are required to support the regulatory framework administered by the ACNC and the ACNC's role as a one-stop shop regulator for the sector.

## Detailed explanation of new law

### Information gathering powers

8.20 This Bill provides the ACNC Commissioner with the power to gather information or documents that are reasonably necessary for the purposes of determining whether:

- a registered entity has complied with a provision subject to monitoring in the ACNC Bill; or
- information given by a registered entity, either on a voluntary basis or to fulfil an obligation under the ACNC Bill, is correct and accurate.

*[Subsection 70-5(1)]*

8.21 The ACNC Commissioner would be able to gather the required information or documents from any entity that could reasonably be expected to have the information required.

8.22 The ACNC Commissioner can send information requests to any entity; requests do not have to be constrained to registered entities. This includes for example banks and financial institutions that manage the funds of registered entities, or any other entity that is affiliated with the registered entity.

8.23 The information that can be requested is confined to information that is reasonably necessary to determine whether a provision subject to monitoring has been, or is being, complied with, and whether information subject to monitoring is correct and accurate.

8.24 Further information on the scope of provisions subject to monitoring and information subject to monitoring is provided in paragraphs 8.54 to 8.59.

8.25 The ACNC Commissioner is required to issue a written notice to an entity requesting the entity:

- to give to the ACNC Commissioner, within the period and in the manner and form specified in the notice, any information;
- to attend and give evidence before the ACNC Commissioner for the purpose of obtaining information;
- to produce to the ACNC Commissioner, within the period and in the manner specified in the notice, any documents; or
- to make copies of any documents and to produce to the ACNC Commissioner, within the period and in the manner specified in the notice, those copies.

*[Subsection 70-5(2)]*

8.26 For the purposes of providing the ACNC Commissioner with evidence, the ACNC Commissioner may require information to be given on oath or affirmation and to be given orally or in writing. The ACNC Commissioner (or an ACNC officer) may administer an oath or affirmation. *[Subsection 70-5(3)]*

8.27 If an entity does not comply with the written notice issued by the ACNC Commissioner the entity commits an offence. The maximum penalty that the entity is liable for is 20 penalty units. *[Subsection 70-5(4)]*

- 8.28 This penalty is low when compared to penalties imposed on for-profit entities for similar offences (see for example Division 353 in Schedule 1 to the *Taxation Administration Act 1953*).
- 8.29 To ensure entities have sufficient time to comply with a written request issued by the ACNC Commissioner, entities are required to be given a minimum of 14 days to comply. [Subsection 70-5(5)]
- 8.30 Written notice issued by the ACNC Commissioner must outline the implications of not complying with the request, including the implications of providing false or misleading information or documents under sections 137.1 and 137.2 of the *Criminal Code*. [Subsection 70-5(6)]
- 8.31 As part of the ACNC Commissioner's general information gathering powers, the ACNC Commissioner is able to inspect documents provided by entities and to make and retain copies of the documents. [Section 70-10]
- 8.32 This power is required in situations where the ACNC Commissioner needs to examine significant quantities of documents and information, and having to do so with limited time would be impractical.
- 8.33 To avoid doubt the ACNC Commissioner will be able to retain possession of copies of documents provided by entities to meet their requirements in the written notice given by the ACNC Commissioner. [Section 70-20]
- 8.34 The ACNC Commissioner would have the authority to take and retain for as long as is necessary, possession of an original document provided by entities. [Subsection 70-15(1)]
- 8.35 Generally, the ACNC Commissioner would take certified copies. However, in specific cases where originals are required to prevent evidence from being destroyed or altered, the ACNC Commissioner would be able to retain the original document.
- 8.36 For example, if the ACNC is provided access to a registered entity's contractual documentation and there is a risk that the entity could destroy or alter the contract which contains incriminating evidence, the ACNC Commissioner would be able to retain the original.
- 8.37 To ensure that the entity providing the document is not disadvantaged by the ACNC Commissioner maintaining possession of the original document, the entity will be entitled to be supplied with a certified copy of the document. [Subsection 70-15(2)]

8.38 The copy certified by the ACNC Commissioner must be received in all courts and tribunals as evidence as if the documents were original. [Subsection 70-15(3)]

8.39 This subsection further ensures that the entity is not disadvantaged by the ACNC Commissioner maintaining possession of the original document.

8.40 As a safeguard, until the ACNC Commissioner supplies the certified copy of the original documents, the entity which provided the ACNC Commissioner with the document will have the right to inspect and make copies of, or take extracts from, the document. [Subsection 70-15(4)]

8.41 An individual will not be excused from complying with a notice given by the ACNC Commissioner on the grounds that complying with the notice may incriminate the individual or expose the individual to a penalty. [Subsection 70-25(1)]

8.42 However, the use of the information that incriminates the individual will be constrained. In particular, the information will not be admissible in evidence against the individual in criminal proceedings or proceedings in relation to the recovery of a civil penalty, this includes information obtained as a direct or indirect consequence of the individual providing information. [Subsection 70-25(2)]

8.43 Providing a blanket no self-incrimination provision could seriously undermine the effectiveness of the regulatory scheme administered by the ACNC. Information gathering and monitoring powers are the main channels available to the ACNC Commissioner to gather information and ultimately monitor ongoing eligibility to registration. The *Guide to Framing Commonwealth Offences* notes that in these situations overriding the privilege is acceptable.

8.44 For example, the privilege against self-incrimination does not apply in relation to the Australian Tax Office's coercive information gathering powers under section 264 of the *Income Tax Assessment Act 1936*. As the ACNC is taking over the regulatory responsibilities of the ATO for registered entities it has been provided with equivalent powers. The Courts have accepted that retaining such a privilege in such cases would frustrate the regulator in the exercise of its functions.<sup>1</sup>

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<sup>1</sup> *Stergis v Commissioner of Taxation* (1989) 89 ATC 4442; *Donovan v Commissioner of Taxation* [1992] FCA 82; (1992) 92 ATC 4114; and *Deputy Commissioner of Taxation v Hugo John De Vonk* [1995] FCA 1715 (4 December 1995).



8.45 However unlike the powers of the ATO this legislation constrains the use of any incriminating evidence by providing both use and derivative use immunity to protect the rights of individuals.

8.46 The ACNC will need to seek information from different types of entities, including from third parties that may be self-incriminatory to those parties. For example, there may be instances of collusion between the management of a charity and donors. In the ACNC regulatory context this type of tax fraud may occur where the committee of management of a charity colludes with a large donor for tax avoidance purposes.

8.47 Failing to provide the ACNC with the necessary scope to act as an effective regulator in the situations outlined above would create significant integrity issues and risks of mismanagement of funds intended for charitable and NFP purposes.

8.48 It is important to keep in mind that individuals working in NFP entities manage public funds, at times with limited oversight. Public companies, for example, have shareholders that ensure the individuals running corporations are accountable. However, the same kind of market discipline does not apply to those managing NFPs and it is arguable that these individuals should be subject to appropriate levels of oversight.

8.49 Individuals working in NFP entities manage resources and monies that come from donors or volunteers and are earmarked for the most vulnerable in our community. It is therefore important that NFP entities are subject to appropriate oversight to ensure those monies are used lawfully to assist our most vulnerable community members.

8.50 It is recognised that overriding the privilege against self-incrimination can lead to a loss of personal liberty. Therefore, it has been decided to constrain the use of any self-incriminating information.

8.51 Constraining the use of any self-incriminating information would generally increase the willingness of individuals to provide information.

8.52 This is particularly important for NFP entities that may be managed by volunteers who may not be aware of the totality of their regulatory obligations and may therefore hesitate to provide information unless assured that this information will not be used to prosecute them.

8.53 Evidence will be admissible against the individual in criminal proceedings if those proceedings relate to: failure of the entity to comply with the written notice; contravention of section 137.1 or 137.2 of the *Criminal Code* which deals with false or misleading information; or section 149.1 of the *Criminal Code* which deals with obstruction of

Commonwealth public officials undertaking functions as a Commonwealth public officials. [Subsection 70-25(2)]

## **Monitoring powers**

8.54 The Bill provides for ACNC officers to enter the premises of an entity and exercise a range of monitoring powers for the purposes of monitoring compliance with a provision which is subject to monitoring, or to determine whether information subject to monitoring is correct. [Subsection 75-15(1)]

8.55 These powers will be used to monitor and investigate specific issues and will complement the ACNC's more general information gathering powers. [Division 75]

8.56 ACNC officers will only be able to enter an entity's premises and exercise monitoring powers when the occupier of the premises has consented to the entry, or the entry is made under a monitoring warrant. [Subsection 75-15(2)]

8.57 The premises which the ACNC will be able to enter are broader than the premises of NFPs registered by the ACNC. However, the information which the ACNC will be able to obtain will be constrained to information which is necessary to administer the ACNC Bill.

8.58 Provisions subject to monitoring include:

- a provision of the Bill that creates an offence; this includes failure to comply with directions given by the ACNC Commissioner and failure by registered entities to keep records as required by the Bill;
- a provision of a legislative instrument made under this Bill that creates an offence;
- a provision of the *Crimes Act 1914* or the *Criminal Code* that creates an offence, to the extent that the offence relates to the Bill or a legislative instrument made under the Bill. This includes section 137.1 or 137.2 of the *Criminal Code* that deal with false or misleading information;
- a provision of the Bill, if non-compliance with the provision gives rise to an administrative penalty, this includes a penalty for failing to lodge a document on time;

- a provision of a legislative instrument made under the Bill, if non-compliance with the provision gives rise to an administrative penalty; and
- ongoing eligibility for registration including conditions for registration in section 25-5 and for the revocation of registration in section 35-10.

*[Section 75-5]*

8.59 Information subject to monitoring includes information given to the ACNC:

- in compliance or purported compliance with a provision of the Bill or of a legislative instrument made under the Bill, this includes information in annual information statements and financial statements;
- in compliance or purported compliance with a provision of the *Crimes Act 1914* or of *the Criminal Code*, to the extent that the provision relates to the Bill or a legislative instrument made under the Bill; or
- any other information given to the ACNC Commissioner, including information given voluntarily, which is included on the Australian Charities and Not-for-profits Register.

*[Section 75-10]*

Example 8.1

A registered entity, WT Inc, makes a statement to the ACNC Commissioner. The statement is believed to be fraudulent, which is a contravention of the *Criminal Code*. The ACNC Commissioner asks WT Inc to provide evidence to support the statement. WT Inc is not cooperative and refuses to provide the information.

As a last resort the ACNC Commissioner could apply for a monitoring warrant, in order to gain access to the appropriate information and determine the validity of the statement made by WT Inc.

***Monitoring powers of ACNC Officers***

8.60 ACNC officers have a set of monitoring powers which they may exercise when they have entered a premise either with the consent of the occupier of the premises, or under a monitoring warrant. *[Section 75-20]*.

8.61 The ACNC requires this set of monitoring powers to ensure that it is able monitor ongoing eligibility to registration and to function as a one-stop shop regulator for the sector.

8.62 The set of monitoring powers ensures that the ACNC is able to collect information and materials which may also be required by other Australian government agencies in administering their duties.

8.63 ***Australian government agency*** means the Commonwealth, a State or a Territory or an authority of the Commonwealth, a State or a Territory.

8.64 Information and materials would still be required for the purposes of monitoring compliance with a provision subject to monitoring, or to determine whether information subject to monitoring is correct.

8.65 Where this information could also be required by other authorities the ACNC would have the power to collect this information and share it with these other Australian government authorities.

8.66 The sharing of information is an important channel available to the ACNC to maintain, protect and enhance public trust and confidence in the sector. The ACNC secrecy framework empowers the ACNC to share information with Australian government authorities where the sharing of information is reasonably necessary to promote the object of the ACNC Bill.

#### Example 8.2

Reduced Poverty Inc is a registered charity established for the relief of poverty. The entity provides food and housing to the homeless in Sydney. The ACNC enters the premises of the entity under a monitoring warrant to monitor whether it continues to meet the requirements of registration. ACNC officers receive concerns raised by beneficiaries of the charity suggesting that the food provided and cooking practices are likely to not meet health standards. If the public becomes aware of this potentially inappropriate practice it would affect public trust and confidence in the sector.

ACNC officers therefore take images of the entity's cooking facilities and a sample of the food provided to the homeless. Consistent with the ACNC's secrecy framework, ACNC officers pass this information on to the government agency which is responsible for local food safety inspections.

Example 8.3

Australia Overseas Aid Inc is a registered charity established for the control of diseases in human beings in overseas jurisdictions. The entity provides medication and medical equipment to countries in need of support. The ACNC receives intelligence that the entity is not complying with all of its registration conditions. ACNC officers enter the entity's premises and decide to take a sample of the medicines on the premises which look suspicious. ACNC officers pass this sample on to the Australian Federal Police.

8.67 The set of monitoring powers provided to ACNC officers in the ACNC Bill are:

- the power to search the premises and anything on the premises;
- the power to examine or observe any activity conducted on the premises;
- the power to inspect, examine, take measurements of, or conduct tests on, anything on the premises;
- the power to make any still or moving image or any recording of the premises or anything on the premises;
- the power to inspect any document on the premises;
- the power to take extracts from, or make copies of, any such document;
- the power to take onto the premises such equipment and materials as the ACNC officer requires for the purpose of exercising powers in relation to the premises;
- the power to sample anything on the premises; and
- the powers set out in the Bill including the power to operate electronic equipment on the premises and the authority to have other individuals assist ACNC officers.

*[Section 75-20]*

8.68 The monitoring powers of an ACNC officer include the power to operate electronic equipment on the premises and to use electronic storage devices which are on the premises and are compatible with the electronic equipment. *[Subsection 75-25(1)]*

8.69 ACNC officers would have to have reasonable grounds to suspect that electronic equipment contains information relevant to determining compliance with a provision subject to monitoring, or if information subject to monitoring is correct.

8.70 If an ACNC officer finds relevant information on electronic equipment, ACNC officers will have the power to:

- convert relevant data into documentary form and remove those documents from the premises;
- transfer relevant data to a disk, tape or other storage device that is brought to the premises by the ACNC officer or is on the premises; and
- remove the disk, tape or other storage device from the premises.

*[Subsections 75-25(2) and (3)]*

8.71 An ACNC officer can only use a disk, tape or other storage device that is in the premises if it has been agreed in writing by the occupier. *[Paragraph 75-25(3)(b)(ii)]*

8.72 These powers are required to ensure ACNC officers are able to convert any relevant information into a usable form. For example, ACNC officers will have the power to use electronic equipment to print documents and remove these documents from the premises.

8.73 The powers also ensure that the occupier's equipment is only used with consent so as to not negatively affect the occupier's operations.

8.74 ACNC officers are able to operate electronic equipment only if the ACNC officer believes on reasonable grounds that the operation of the equipment can be carried out without damage to the equipment. *[Paragraph 75-25(4)(a)]*

8.75 The ACNC officer also has to have reasonable grounds to suspect that:

- the equipment contains data relevant to determining whether a registered entity has, or is, complying with provisions subject to monitoring, or if information subject to monitoring is correct;
- the disk, tape or other storage device contains data relevant to determining whether a registered entity has, or is, complying

with provisions subject to monitoring, or if information subject to monitoring is correct. *[Paragraph 75-25(4)(b)]*

8.76 These provisions ensure that ACNC officers can access required information and that the interests and privacy of registered entities and their employees are adequately protected.

8.77 In certain circumstances, an ACNC officer may secure a thing or item that is found on the premises for a period of 24 hours, or more if an extension is provided by an *issuing officer* which is defined as a Federal magistrate or magistrates under the Bill. *[Section 75-30]*

8.78 An ACNC officer can secure a thing for 24 hours when an ACNC officer believes on reasonable grounds that:

- a provision subject to monitoring has been contravened with respect to the thing;
- the thing affords evidence of the contravention of a provision subject to monitoring; or
- the thing is intended to be used for the purpose of contravening a provision subject to monitoring.

*[Paragraph 75-30(2)(b)]*

8.79 In addition, ACNC officers have to suspect on reasonable grounds that:

- it is necessary to secure the thing in order to prevent it from being concealed, lost or destroyed before a warrant to seize the thing is obtained; and
- it is necessary to secure the thing without a warrant because the circumstances are serious and urgent.

*[Paragraph 75-30(2)(c)]*

8.80 These conditions have been included to ensure that ACNC officers will only secure a thing when it is required, and when there is a serious risk that the thing needs to be secured to prevent it from being destroyed in order to disturb the ACNC investigation.

8.81 In addition, the circumstances have to be serious and urgent to enable ACNC officers to secure the thing without appropriate search warrants. This can include a situation where public funds are going to be used in a highly inappropriate manner.

8.82 The 24 hour period may only be extended in accordance with the Bill. To extend the time period an ACNC officer has to apply to an ‘issuing officer’ for an extension of the period. *[Subsection 75-30(3)]*

8.83 The ACNC officer needs to suspect on reasonable grounds that the extension is required. The magistrate will take all information into account when deciding whether to provide the extension. *[Subsection 75-30(4)]*

8.84 The Bill also allows for the occupier of the premises to be heard in relation to ACNC officers’ extension application. *[Subsection 75-30(4)]*

8.85 This ensures that the circumstances surrounding the extension, including the implications of the extension on the operations of the occupier, are taken into account. For example, the occupier may suggest alternative arrangements which would ensure ACNC officers have access to relevant information and that the operations of the occupier are not unnecessarily affected.

8.86 The issuing officer may issue the extension if the ‘issuing officer’ is satisfied that it is necessary to extend the period over which the thing is secured, in order to prevent the thing from being concealed, lost or destroyed. *[Subsection 75-30(5)]*

8.87 ACNC officers would be required to provide information to the ‘issuing officer’ on oath or affirmation.

8.88 The provisions of this Division relating to the issuance of monitoring warrants, including Subdivision 75-F and Subdivision 75-H apply, with necessary modifications, to the issuance of an extension. *[Subsection 75-30(6)]*

8.89 The framework established by Division 75 for the issuance of warrants applies to extensions. However, in certain sections the provisions need to be modified to apply to extensions.

8.90 For example, in Subdivision 75-F the condition for issuing a monitoring warrant differs from the condition the ‘issuing officer’ needs to consider when granting an extension.

8.91 The period may be extended on more than one occasion. *[Subsection 75-30(7)]*

8.92 An ACNC officer may be assisted by other individuals in exercising monitoring powers or performing functions or duties under this Division. ACNC officers can only be assisted if the assistance is necessary and reasonable. *[Section 75-35]*



8.93 This may be the case where assistance is required to help carry out documents or where the ACNC officer requires specialised assistance, including for example, assistance to operate electronic equipment.

8.94 An individual assisting the ACNC officer would have the power to:

- enter the premises; and
- perform functions and duties provided for under this Division of the Bill in order assist the ACNC officer to determine if:
  - a provision subject to monitoring has been, or is being, complied with; or
  - information subject to monitoring is correct.

8.95 The individual assisting the ACNC officer would be required to use these powers in accordance with a direction given by an ACNC officer. *[Paragraph 75-35(2)(c)]*

8.96 To ensure all provisions in this Division apply to individuals assisting ACNC officers, including section 120-480 on compensation for damage to electronic equipment, powers exercised and functions undertaken by the by the individual assisting ACNC officers are taken to have been exercised by an ACNC officer. *[Subsections 75-35(3) and 75-35(4)]*

8.97 To avoid doubt, any direction given by an ACNC officer to an individual assisting the ACNC officer, is not a legislative instrument. *[Subsection 75-35(5)]*

8.98 Where entry is authorised under a monitoring warrant or by consent, an ACNC officer may ask the occupier, or an individual that represents the occupier to answer any questions and produce any document which relates to a:

- provision subject to monitoring; or
- information subject to monitoring.

*[Subsections 75-40(1), (2) and (3)]*

8.99 An individual will not be excused from answering any questions or producing any document in order to comply with a request from an ACNC officer on the grounds that complying may incriminate the individual or expose the individual to a penalty. *[Subsection 75-40(4)]*

8.100 However, the use of the information that incriminates the individual will be constrained. In particular, the information will not be admissible in evidence against the individual in criminal proceedings; this includes information obtained as a direct or indirect consequence of the individual providing information. *[Subsection 75-40(5)]*

8.101 This policy is consistent with that of Section 70-20 which was developed to support the effectiveness of the regulatory scheme administered by the ACNC and ensure the ACNC has access to required information.

8.102 Evidence will be admissible against the individual in criminal proceedings if those proceedings relate to: failure by the individual to comply with the written notice; contravention of sections 137.1 or 137.2 of the *Criminal Code* which deals with false or misleading information; or section 149.1 of the *Criminal Code* which deals with obstruction of Commonwealth public officials undertaking functions as a Commonwealth public officials. *[Subsection 75-40(5)]*

#### ***Obligations and incidental powers of ACNC officers***

8.103 ACNC officers may enter the premises of an entity and exercise monitoring powers if an occupier of the premises, or an individual that represents the occupier of the premises, consents to the entry.

8.104 ACNC officers would be required to inform the occupier of the premises that consent is voluntary and that the occupier may therefore refuse consent. *[Subsection 75-45(1)]*

8.105 ACNC officers will only lawfully be able to enter premises and exercise monitoring powers if the consent is truly voluntary. *[Subsection 75-45(2)]*

8.106 If ACNC officers do not fulfil both conditions mentioned above, the ACNC would not be able to use the information or evidence gathered to administer the ACNC Bill or in criminal proceedings.

8.107 Occupiers of the premises may provide consent for entry for a limited time period. The consent will only have effect for that period unless the consent is withdrawn earlier by the occupier of the premises. *[Subsection 75-45(3)]*

8.108 If consent is not limited to a particular period, the consent will have effect until it is withdrawn. *[Subsection 75-45(5)]*

8.109 The occupier has the discretion to extend the period of consent if requested to do so by an ACNC officer and the occupier has no issue with extending consent. *[Subsection 75-45(4)]*

8.110 If the occupier of the premises decides to withdraw the consent given to ACNC officers, the ACNC officers and any person assisting the ACNC officers must leave the premises. *[Subsection 75-45(6)]*

8.111 When an ACNC officer enters the premises of an entity under a warrant issued by an issuing officer, the ACNC officer is required to announce that he or she is authorised by virtue of a warrant to enter the premises. *[Subsection 75-50(1)]*

8.112 ACNC officers are also required to show their identity card to the occupier of the premises and to give the individuals at the premises an opportunity to allow entry to the premises. *[Subsection 75-50(2)]*

8.113 However, an ACNC officer does not need to comply with these requirements if the ACNC officer reasonably believes that immediate entry is required. If this is the case, the ACNC officer must show their identity card as soon as practicable after entering the premises. *[Subsection 75-50(2)]*

8.114 Immediate entry will be required where ACNC officers have the reasonable belief that the safety of a person is at risk or that by announcing entry the effective execution of the warrant is at risk. *[Subsection 75-50(2)]*

8.115 This power would be used in rare cases, where an ACNC officer determines that information subject to monitoring is at risk of being destroyed if the officer does not move quickly to obtain this information.

8.116 An ACNC officer is, under these circumstances, not required to abide by the above provisions which require ACNC officers to announce that he or she is authorised to enter the premises, and to show his or her identity card.

8.117 When ACNC officers enter under the exception outlined above, the officers would be required to show the occupier of the premises, or a person who represents the occupier, his or her identity card as soon as practicable after entering the premises. *[Subsection 75-50(3)]*

8.118 ACNC officers executing a monitoring warrant must be in possession of the warrant, or a copy of the warrant. *[Section 75-55]*

8.119 ACNC officers must make a copy of the warrant available to the occupier of the premises, or another individual that represents the

occupier, and inform the occupier or individual who represents the occupier of their rights and responsibilities in English. *[Section 75-60]*

8.120 This provision ensures that the occupier is satisfied that a warrant has been issued, and that the occupier is made aware of the purposes for which the warrant is issued and the time period for which the warrant will be in force (further details on the content of the warrant are provided in Section 75-85).

8.121 If ACNC officers suspect on reasonable grounds that there is relevant information or data on the premises, that this information is accessible by an expert operating electronic equipment, and the data may be interfered with, ACNC officers will have the power to secure electronic equipment on the premises. *[Subsections 75-65(1), (2) and (3)]*

8.122 This power is required for ACNC officers to gather data which may not be easily accessible and requires an expert to extract and convert into a usable form. This power could be used in situations where data is encrypted.

8.123 The equipment may be secured by locking it up, placing the equipment under the watch of a guard or any other means. *[Subsection 75-65(2)]*

8.124 ACNC officers are required to inform the occupier of their intention to secure the equipment. The officers must also inform the occupier that the equipment may be secured for a period of up to 24 hours. *[Subsection 75-65(4)]*

8.125 The electronic equipment may be secured until the 24-hour period ends or for a shorter period if the equipment has been operated by the expert. *[Subsection 75-65(5)]*

8.126 ACNC officers may apply to an issuing officer for an extension of the 24-hour period if the ACNC officer suspects on reasonable grounds that the equipment needs to be secured for longer. *[Subsection 75-65(6)]*

8.127 ACNC officers would use this power when they can't get an expert to operate the equipment after the 24-hour period has passed, or when the expert was unable to operate the equipment and the officer engages another expert to operate the equipment.

8.128 Before ACNC officers make the application to the 'issuing officer', the officers must give notice to the occupier of the premises, with the occupier being entitled to be heard in relation to the application for the extension. *[Subsection 75-65(7)]*

- 8.129 This requirement ensures that occupiers are given a chance to respond to the officers' intention to apply for an extension.
- 8.130 The 'issuing officer' may issue an extension if satisfied that it is necessary to do so to prevent the destruction, alteration or inference with the relevant data. *[Subsection 75-65(8)]*
- 8.131 The framework under which a monitoring warrant is issued applies to cases where an 'issuing officer' extends the time period which electronic equipment is secured under this Section. *[Subsection 75-65(9)]*
- 8.132 In general, the framework established by Division 75 for the issuance of warrants applies to extensions. However, in certain sections the provisions need to be modified to apply to extensions.
- 8.133 For example, in Subdivision 75-F the condition for issuing a monitoring warrant differs from the condition the 'issuing officer' needs to consider when granting an extension.
- 8.134 The 24-hour period may be extended more than once. *[Subsection 75-65(10)]*
- 8.135 If damage or corruption occurs to the electronic equipment because insufficient care was exercised in selecting the expert to operate the equipment, or insufficient care was exercised by the individual, the Commonwealth must pay the owner of the equipment reasonable compensation for the damage or corruption. *[Subsection 75-70(1)]*
- 8.136 The Commonwealth and the owner have to agree on a reasonable amount. *[Subsection 75-70(2)]*
- 8.137 If the owner and the Commonwealth do not agree on a compensation amount, the owner or user may institute proceedings in a Court for a reasonable amount of compensation. The Court would have the responsibility of determining the reasonable amount of compensation. *[Subsection 75-65(3)]*
- 8.138 In coming to a view on the reasonable amount of compensation regard is to be had to whether the occupier of the premises, or the occupier's employees or agents, were available and provided any appropriate warning or guidance on the operation of the equipment. *[Subsection 75-70(4)]*
- 8.139 For these subsections to apply, damage has to be caused to the equipment, or data recorded on the equipment has to be damaged or programs associated with the use of the equipment, or with the use of the data have to be damaged or corrupted. *[Subsection 75-70(1)]*

### ***Occupier's rights and responsibilities***

8.140 The occupier of premises to which a monitoring warrant relates, or another person who represents the occupier, is entitled to observe the execution of the monitoring warrant if present at the premises while the warrant is being executed. *[Subsection 75-75(1)]*

8.141 ACNC officers continue to be able to execute the warrant in 2 or more areas of the premises at the same time. *[Subsection 75-75(3)]*

8.142 The occupiers will lose the right to observe the execution of the warrant if the occupier or other person impedes the proper execution of the monitoring warrant. *[Subsection 75-75(2)]*

8.143 Occupiers must provide ACNC officers that are executing a warrant and individuals assisting the ACNC officer with reasonable facilities and assistance for the effective exercise of their powers. *[Subsection 75-80(1)]*

8.144 The occupier commits an offence if the occupiers do not provide ACNC officers with reasonable facilities and assistance for the effective exercise of their powers. The penalty for this offence is 20 penalty units. *[Subsection 75-80(2)]*

### ***Monitoring warrants***

8.145 The ACNC Commissioner may apply to an 'issuing officer' for a monitoring warrant under the Bill. *[Subsection 75-85(1)]*

8.146 The magistrate may issue the monitoring warrant if satisfied, by information on oath or affirmation provided by the ACNC Commissioner, that it is necessary that one or more ACNC officer should have access to the premises for the purpose of determining whether:

- a provision subject to monitoring has been, or is being, complied with; or
- information subject to monitoring is correct.

*[Subsection 75-85(2)]*

8.147 The ACNC Commissioner or their delegate must give the magistrate any information required concerning the grounds on which the warrant is being sought. This information can be provided orally or by affidavit. *[Subsection 75-85(3)]*

8.148 The monitoring warrant must contain certain information which is set out in the Bill, including the premises to which the warrant relates,

the purpose for which the warrant is issued, and the day on which the warrant ceases to be in force. *[Subsection 75-85(4)]*

8.149 The monitoring warrant will be in force for a period of no more than one month after the issue of the warrant. *[Paragraph 75-85(4)(f)]*

***Powers of issuing officers***

8.150 Power conferred on an ‘issuing officer’ to issue a monitoring warrant is conferred in a personal capacity, not as a court or a member of a court. *[Subsection 75-90(1)]*

8.151 The issuing officer does not need to accept the power conferred by this Bill. *[Subsection 75-90(2)]*

8.152 An issuing officer will have immunity when exercising the power under this Division as the court of which the issuing officer is a member; or as a member of the court of which the issuing officer is a member. *[Subsection 75-90(3)]*

***General provisions***

8.153 The ACNC Commissioner must issue an identity card to an ACNC officer who the ACNC Commissioner considers is likely to exercise monitoring powers and functions under this Bill. *[Subsection 75-95(1)]*

8.154 The ACNC Commissioner would provide these individuals with the appropriate training making them aware of their obligations and responsibilities.

8.155 The identity card must be in the form set out by the ACNC Commissioner, and contain a recent photograph of the ACNC officer. *[Subsection 75-95(2)]*

8.156 A photograph is required to ensure that the occupiers of the premises are satisfied that the ACNC officers mentioned in the warrant are actually executing the warrant.

8.157 An ACNC officer would commit an offence if the officer ceases to be an ACNC officer and does not return the identity card to the ACNC Commissioner within 14 days of ceasing to be an ACNC officer. *[Subsection 75-95(3)]*

8.158 The penalty for this offence will be 1 penalty unit. The offence will be a strict liability offence. *[Subsection 75-95(4)]*

8.159 The officer would not commit an offence if the identity card was lost or destroyed. The officer would bear the evidential burden in relation to the offence. *[Subsection 75-95(5)]*

8.160 ACNC officers must carry their identity card at all times when exercising the monitoring powers. *[Subsection 75-95(6)]*



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## **Chapter 9**

# **Education, compliance and enforcement**

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### **Outline of chapter**

- 9.1 The object of this Bill is to maintain, protect and enhance the public trust and confidence in the NFP sector.
- 9.2 The ACNC will primarily achieve the object of the Bill by providing the NFP sector with guidance and educative materials to assist the sector to understand and comply with regulatory obligations.
- 9.3 The Bill contains a wide spectrum of enforcement powers reflecting that the ACNC would not have powers of enforcement unless specifically provided for in legislation.
- 9.4 In cases where the ACNC's educative function fails to induce the required action, the ACNC Commissioner will have the ability to use a range of enforcement powers.
- 9.5 The range of enforcement powers this Bill provides enable the ACNC to take strong, proportional and targeted actions to address actions or lack of actions that could threaten public trust and confidence in the NFP sector.
- 9.6 This Bill provides the ACNC with the authority to:
- issue warning notices;
  - issue directions;
  - enter into enforceable undertakings;
  - apply to the courts for injunctions;
  - suspend or remove responsible entities; and
  - appoint acting responsible entities.
- 9.7 This Chapter specifies the application and necessity clauses that must be met prior to the ACNC Commissioner using enforcement powers; the range and scope of the ACNC's enforcement powers; and the penalties associated with failing to comply with the ACNC Commissioner's enforcement powers.

## Summary of new law

### Enforcement powers

9.8 The new law provides the ACNC Commissioner with a range of enforcement powers to assist in maintaining, protecting and enhancing public trust and confidence in the sector's new regulatory framework.

9.9 Enforcement powers are modelled on those given to other Commonwealth regulators such as the ASIC, the Australian Prudential Regulation Authority (APRA) and the Australian Competition and Consumer Commission (ACCC).

9.10 The ACNC will focus on education in order to minimise and address non-compliance. However, the ACNC Commissioner will require powers to deal with serious and significant wrong-doing and must be able to take appropriate and targeted action against contraventions of the Bill.

9.11 Enforcement powers are an important tool for regulators to deter entities from acting in an inappropriate manner and provide mechanisms to protect assets from inappropriate use.

9.12 This Bill provides the ACNC with the authority to:

- issue warning notices; *[Division 80]*
- issue directions; *[Division 85]*
- enter into enforceable undertakings; *[Division 90]*
- apply to the courts for injunctions; *[Division 95]*
- suspend or remove responsible entities; and *[Division 100]*
- appoint acting responsible entities. *[Division 100]*

9.13 The Bill specifies the conditions that must be satisfied before the ACNC Commissioner can use enforcement powers, the scope and range of the ACNC's enforcement powers, and the associated penalties for contravening enforcement powers issued by the ACNC Commissioner.

9.14 The ACNC Commissioner would be able to exercise enforcement powers only over registered entities.

9.15 The ACNC Commissioner may generally only use enforcement powers against 'federally regulated entities' (defined below), however, the ACNC Commissioner may revoke the registration of any registered entity.

The ACNC Commissioner's enforcement powers in relation to external conduct standards apply to all registered entities.

9.16 The ACNC's enforcement powers are consistent with those available to other regulators under Commonwealth laws, and are similar to the enforcement powers available to NFP regulators in comparable jurisdictions, for example, the Charities Commission of England and Wales, and the Office of the Scottish Charity Regulator.

9.17 The reviews and appeals provisions in Chapter 12 will generally apply to the ACNC Commissioner's enforcement powers including decisions taken by the ACNC Commissioner to issue or vary directions and decisions to suspend or remove responsible entities.

## Detailed explanation of new law

### Enforcement powers

9.18 The ACNC will primarily achieve the objects of this Bill by providing the NFP sector with guidance and educative materials to assist the sector to understand and comply with regulatory obligations.

9.19 In cases where the ACNC's educative function fails to induce required action, the ACNC Commissioner will have the ability to use a range of enforcement powers.

9.20 The final report on the *Scoping Study for a National Not-for-profit Regulator* recommended that a regulator for the NFP sector should be given appropriate enforcement powers to take proportional and targeted compliance actions.

9.21 The report recommended that the enforcement powers should include asset protection powers, the power to remove or suspend responsible entities, and information gathering powers.

9.22 More broadly, enforcement powers are an important tool for regulators which deter entities from acting in an inappropriate manner and provide mechanisms to protect assets from inappropriate use.

9.23 This Bill provides the ACNC with the authority to:

- issue warning notices; [Division 80]
- issue directions; [Division 85]

- enter into enforceable undertakings; *[Division 90]*
- apply to the courts for injunctions; *[Division 95]*
- suspend or remove responsible entities; and *[Division 100]*
- appoint acting responsible entities. *[Division 100]*

9.24 This range of enforcement powers will enable the ACNC to take proportional and targeted compliance action.

9.25 This is a fundamental change from the sector's current regulatory framework where the default Commonwealth regulator, the ATO, only has the power to remove an entity's access to tax concessions and is unable to take action commensurate to the circumstances being addressed.

9.26 Australian regulators, including APRA, the ACCC and ASIC are generally given a range of enforcement powers which can include the authority to issue directions, the authority to enter into enforceable undertakings, and the right to apply to the courts to have injunctions imposed.

9.27 The ACNC will take over the roles of other Commonwealth level regulators in cases where these other regulators are responsible for overseeing the governance structures and financial performance of NFP entities. The enforcement powers provided by this Bill are therefore modelled on the powers given to these other regulators.

9.28 Prior to using enforcement powers the ACNC Commissioner would have to satisfy standard application and necessity clauses which are generally consistent across the range of enforcement powers.

9.29 The ACNC Commissioner would also be required to take into account a range of policy matters, including an entity's compliance track record, prior to using enforcement powers.

9.30 The type of enforcement power used by the ACNC Commissioner will be determined by the kinds of actions which are required to address the contravention or non-compliance. In some cases, all that will be required is the issuance of a warning notice to compel self-correction; in other cases where an entity has persistently failed to meet regulatory obligations, the ACNC Commissioner may have to remove a responsible entity.

9.31 Where possible, and in line with the regulatory approach to be adopted by the ACNC, the ACNC Commissioner will attempt to obtain self-correction through its educative role.

***Application clause and necessity clause***

9.32 The application and necessity clauses represent high thresholds designed to ensure that these powers are only used when necessary.

9.33 The ‘application clause’ constrains the provisions the ACNC Commissioner is able to enforce, and the types of entities the ACNC Commissioner is able to apply enforcement powers toward.

9.34 The application clause and necessity clause that are required to be satisfied would generally be consistent across the range of the ACNC Commissioner’s enforcement powers.

9.35 The ACNC Commissioner is able to use enforcement powers if:

- an entity is a federally regulated entity, and the ACNC Commissioner reasonably believes that the entity has contravened, or is more likely than not to contravene, a provision in the Bill;
- an entity is a federally regulated entity, and the ACNC Commissioner reasonably believes that the entity has not complied, or is more likely than not to not comply, with a governance standard; or
- the ACNC Commissioner reasonably believes that the registered entity has not complied, or more likely than not to not comply, with an external conduct standard.

9.36 The ‘reasonably believes’ threshold ensures the ACNC Commissioner can only use enforcement powers if any reasonable individual, provided with the set of information available to the ACNC Commissioner, would deem that a particular registered entity has contravened a provision of the Bill, or has failed to comply with a governance standard or external conduct standard.

9.37 It would be inconsistent with this requirement for the ACNC Commissioner to use enforcement powers in situations where information on an entity’s compliance with regulatory obligations is inconclusive or does not clearly point to a likely contravention or case of likely non-compliance.

9.38 The ACNC Commissioner would be able to use enforcement powers in cases where it is ‘more likely than not’ that a registered entity will contravene a provision in the Bill, or will fail to comply with governance standard or external conduct standard.

9.39 The ACNC Commissioner would need to have reliable information which clearly indicates that, barring any discretionary change, the registered entity will contravene a provision in the Bill, or will fail to comply with a governance standard or external conduct standard.

9.40 Two implicit conditions are required to be satisfied prior to the ACNC Commissioner using enforcement powers for cases where contraventions or non-compliance are more likely than not.

9.41 Information needs to be reliable. Generally, reliable information includes information contained in financial statements, information statements, annual reports, governing documents, contractual agreements and any other information, forms or statements that the ACNC Commissioner obtains from a reliable source.

9.42 Information that would not be considered reliable includes rumours, opinions and subjective and unsubstantiated complaints and information provided to the ACNC Commissioner.

#### **Example 9.1**

The Paul Bird Foundation is a charity established for the advancement of religion. The ACNC is made aware that the Foundation will use its funds to sponsor a professional sporting team. Using its monitoring powers the ACNC obtains a copy of the contract between the charity and the sporting organisation. In this case the entity will not be using its charity funds to promote its charitable purpose resulting in a contravention of the ACNC Bill. The ACNC could use enforcement powers to ensure the entity does not contravene the Bill.

9.43 Additionally, the situations where an entity is ‘more likely than not’ to contravene a provision in the Bill or more likely than not to not comply with a governance or external conduct standard, but the circumstances that led to this conclusion are more likely than not to be temporary and rectified without discretionary action are also excluded.

#### **Example 9.2**

The CFO of Moments Foundation, a registered charity, has taken sick leave in the lead up to the end of the financial year. Given the length of leave it is more likely than not that the entity will not submit its annual financial statement by the due date, rather it will be marginally late and be submitted when the CFO returns from leave. In this case,

the ACNC Commissioner could use its enforcement powers for the 'more likely than not' contravention but would choose not to because no actual discretionary change would be required for the entity to become compliant.

9.44 The 'necessity clause' ensures that the ACNC Commissioner can only use enforcement powers when use of the power is necessary to directly address the contravention or more likely than not contravention of the ACNC Bill, or the non-compliance or more likely than not non-compliance with a governance standard or external conduct standard.

9.45 The necessity clause constrains the outcomes the ACNC Commissioner can achieve, through the use of enforcement powers, to outcomes which directly address the contravention or non-compliance.

9.46 The ACNC Commissioner would not be able to direct a registered entity to undertake a specified act which is unrelated to the contravention or case of non-compliance.

9.47 This requirement addresses concerns that any open-ended enforcement power could provide for the ACNC to inappropriately interfere in a registered entity's operations.

### **Example 9.3**

OPD Inc has persistently failed to provide the ACNC Commissioner with annual information statements. The ACNC Commissioner may direct OPD Inc to complete and provide an information statement to the ACNC Commissioner for the years for which OPD Inc has failed to lodge. The direction contains a specified act which addresses the contravention. The ACNC Commissioner would not be able to direct the OPD Inc to change other aspects of its operations as this would be inconsistent with the necessity clause.

### **Example 9.4**

The Better Humans Fund submits a duty to notify notice which proposes a change to its charitable purpose that would render it ineligible for registration. The ACNC Commissioner may direct the Fund to not change its governing rules in a specified manner. However, the ACNC Commissioner could not direct the registered entity to undertake other acts, such as require the entity to cease to transfer funds to meet contractual obligations.

### ***Matters ACNC Commissioner must take into account***

9.48 The ACNC Commissioner would be required to consider a range of policy matters (outlined below) prior to using any enforcement power or revoking an entity's registration. [Subsection 35-10(2)]

9.49 These matters are wider than the factors considered in developing a view on whether the application clause and necessity clause have been satisfied.

9.50 The matters ensure that the ACNC Commissioner considers the registered entity's track compliance record, the nature and persistence of the contravention or non-compliance, and the implications that result from the contravention or non-compliance.

9.51 Requiring the ACNC Commissioner to consider this broader range of matters provides the ACNC Commissioner with the scope to act appropriately when faced with identical cases of non-compliance.

9.52 In deciding whether to use enforcement powers, the ACNC Commissioner must consider:

- the nature, significance and persistence of the contravention or non-compliance [*Paragraph 35-10(2)(a)*];
- the actions the ACNC Commissioner, the registered entity, or any of the responsible entities could have taken:
  - to address the contravention or non-compliance (or prevent the more likely than not contravention or non-compliance); or
  - to prevent any similar contravention or non-compliance in the future [*Paragraph 35-10(2)(b)*];
- the desirability of ensuring that contributions made to the registered entity are applied consistently with the NFP nature, and the purpose, of the registered entity [*Paragraph 35-10(2)(c)*];
- the objects of any Commonwealth laws that refer to registration under this Bill [*Paragraph 35-10(2)(d)*];
- the extent (if any) to which the registered entity is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence in the sector [*Paragraph 35-10(2)(e)*];
- the welfare of members of the community (if any) that receive direct benefits from the registered entity [*Paragraph 35-10(2)(f)*]; and



- any other matter of policy that the ACNC Commissioner considers relevant [*Paragraph 35-10(2)(g)*].

9.53 This list of matters should be considered in its entirety and a decision should be made by balancing each of the factors.

9.54 The individual matters are outlined and discussed in the paragraphs below.

*Nature, significance and persistence of contravention or non-compliance*

9.55 The ACNC Commissioner must consider the nature, significance and persistence of any contravention or non-compliance. [*Paragraph 35-10(2)(a)*]

9.56 Under this matter, the ACNC Commissioner must consider:

- whether any contraventions have occurred;
- whether the responsible entity has persistently contravened or not complied with the Bill;
- the implications associated with the breaches; and
- the nature or underlying cause of the breach.

**Example 9.5**

Two registered entities commit the same breach. Both entities fail to notify the ACNC Commissioner of major changes to their governing rules which could impact on their registration entitlement.

One of the registered entities has a track record of failing to comply with regulatory obligations including, for example, failing to lodge information statements by the required time.

In both cases a contravention occurs and the ACNC Commissioner may use enforcement powers to direct both entities to comply with the duty to notify requirement in the Bill.

However, the ACNC Commissioner must consider other aspects, including the registered entities' track records of compliance with regulatory responsibilities. The ACNC Commissioner could choose to use one of its enforcement powers against the registered entity with a track record of breaching regulatory requirements.

*Actions taken*

9.57 In deciding whether to use any of the enforcement powers available under this Bill, the ACNC Commissioner must consider what action the ACNC Commissioner, the registered entity, or any of the responsible entities could or have taken to address any contravention or non-compliance (or prevent any more likely than not contravention or non-compliance), or to prevent any similar contravention or non-compliance. *[Paragraph 35-10(2)(b)]*

9.58 This matter ensures that the ACNC Commissioner takes into account any discretionary actions taken by the registered entity or the responsible entities to address the breach.

9.59 Discretionary actions may include any actions taken in response to other enforcement powers used by the ACNC Commissioner. It also includes changes to the legal and operational framework of the registered entity which addresses the current contravention or case of non-compliance as well as reducing the likelihood of future breaches.

9.60 By mandating that the ACNC Commissioner considers the actions which the responsible entity could have undertaken ensures that responsible entities are held accountable for matters which they have control over and gives them opportunities for self-correction.

*Ensuring contributions are applied consistently with nature and purpose of NFPs*

9.61 The ACNC Commissioner must also consider how to ensure that ‘contributions’ made to the registered entity are applied consistently with the NFP nature, and the purpose, of the registered entity. *[Paragraph 35-10(2)(c)]*

9.62 What constitutes *contributions* under the Bill is defined broadly. Contribution includes provision of money, property, or an individual’s time or reputation or other gift. Contributions also include Government tax concessions, grants and other forms of support. *[Section 205-40]*

9.63 Registered entities are registered under a type and subtype, and are eligible to receive public monies which are used to promote the registered entity’s charitable purpose.

9.64 The regulatory framework developed by this Bill helps to ensure that monies are used consistently with the purposes for which the funds were given to the NFP entity.

9.65 Therefore, when coming to a view on whether to use any of the enforcement powers available, the ACNC Commissioner needs to

consider whether the use of the enforcement power increases the likelihood that charitable funds are protected and used appropriately.

*Other Commonwealth laws*

9.66 The ACNC Commissioner must take into consideration the objects of any Commonwealth laws, the operation of which are affected by registration under this Bill. *[Paragraph 35-10(2)(d)]*

9.67 Registration has implications for the entity in relation to the operation of other Acts, mostly notable the tax laws. For example, to access tax concession earmarked for the sector an entity must be registered by the ACNC.

9.68 Registration helps ensure that entities are appropriately regulated as well as operating under appropriate governance arrangements. The ACNC Commissioner must therefore consider the implications of using or not using enforcement powers on the objects of these other Acts.

9.69 For example, the ACNC Commissioner must consider whether not using enforcement powers to ensure compliance with the Bill would have severe implications for the integrity of the tax law.

*Maintaining, protecting and enhancing public trust and confidence*

9.70 The ACNC Commissioner must consider the extent to which the registered entity is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence mentioned in the objects clause. *[Paragraph 35-10(2)(e)]*

9.71 This matter ensures the ACNC Commissioner considers broader issues related to the public's trust and confidence in the sector when coming to a view on whether to use enforcement powers.

9.72 For example, the ACNC Commissioner may consider the implications on the public's trust and confidence in the sector resulting from not taking action and suspending a responsible entity that is defending significant criminal charges in court.

9.73 Further explanation of public trust and confidence can be found in Chapter 1 – Background.

*Welfare of members of the community*

9.74 The ACNC Commissioner must consider the welfare of members of the community (if any) that receive direct benefits from the registered entity. *[Paragraph 35-10(2)(f)]*

9.75 In considering whether to use an enforcement power, or which power to use, the ACNC Commissioner must consider whether a course of action would improve or worsen the welfare of any members of the community that benefit directly from the registered entity.

*Other matters*

9.76 The ACNC Commissioner can also take into consideration any other matter that he or she considers relevant. [*Paragraph 35-10(2)(g)*]

**Example 9.6**

The Ciaro Organisation is a federally regulated entity that is registered with the ACNC. All registered entities are required to comply with the governance standards in this Bill as a condition of registration.

The Ciaro Organisation is providing short-term direct care to animals that have been mistreated and their governing rules state that their purpose is to relieve poverty. The ACNC Commissioner considers this is a contravention of the governance standard.

The entity puts processes in place to ensure it is operating to relieve poverty, and the ACNC Commissioner is satisfied with those processes. However, the entity decides it wants to expand its purposes over the long term. The entity applies to the ACNC Commissioner to change its governing rules and expand its purposes.

In this case there is no need for the ACNC Commissioner to suspend or remove the responsible entity, or use other enforcement powers.

If, on the other hand, the entity did not to address the non-compliance, the ACNC Commissioner could use an enforcement power, such as the power to suspend or remove responsible entities, in order to ensure compliance.

**Example 9.7**

The Moments Foundation is a registered entity established for the advancement of religion. It has several individuals appointed as responsible entities.

One of these responsible entities has recently been declared bankrupt. The entity may contravene a governance standard. The Moments Foundation takes steps to effectively address the contravention. The ACNC Commissioner does not have to remove the responsible entity to ensure compliance in this situation.

**Example 9.8:**

Company Go-To was established to promote education in rural communities. The director falls ill and is unable to send the ACNC its information and financial statements. As such the entity does not meet its obligations.

A minor contravention, like failing to lodge statements when due for the first time, are unlikely to result in the ACNC Commissioner using enforcement power.

However, if this continues, the ACNC Commissioner may consider using one of the enforcement powers to ensure compliance.

***Federally regulated entity***

9.77 The ACNC Commissioner may generally only use her or his enforcement powers against federally regulated entities. The ACNC Commissioner's enforcement powers in relation to the external conduct standards apply to all registered entities.

9.78 Federally regulated entities are entities that the Commonwealth has power to regulate under section 51(xx) of *The Constitution* (the corporations power) or section 122 of *The Constitution* (the Territories power).

9.79 The corporations power allows the Commonwealth to make laws with respect to constitutional corporations. The Territories power allows the Commonwealth to make laws for the government of any Territory.

9.80 Constitutional corporations include a financial corporation, a trading corporation or a foreign corporation, and a body corporate that is incorporated in a Territory. [*Section 205-20*]

9.81 Federally regulated entities are also entities based in a Territory and relate to the Territories power, such as:

- a body corporate incorporated in a Territory [*paragraph 205-15(e)*]; or
- a trust, all of the trustees of which are bodies corporate incorporated in a Territory [*paragraph 205-15(d)*]; or
- an entity, the core or routine activities of which are carried out in or in connection with a Territory [*paragraph 205-15(e)*].

9.82 The ACNC will bring matters concerning non-federally regulated entities to the attention of the relevant State or Territory regulators. These regulators operate under their own laws. The ACNC is expected to work with State and Territory regulators to ensure that they are aware of matters concerning non-federally regulated entities for the purposes of administering their own laws.

9.83 The Commonwealth Government is negotiating a statement of principles with States and Territories to facilitate cross-jurisdiction regulatory cooperation.

### **Warning notices**

9.84 The ACNC Commissioner has the power to issue written warning notices to registered entities. *[Division 80]*

9.85 Warning notices are an effective tool to strengthen the sector's transparency and accountability and to induce change where appropriate.

9.86 The ACNC Commissioner must make warning notices publicly available through the ACN Register. *[Note in subsection 80-5(2)]*

9.87 Warning notices provide the public with a source of information on contraventions or non-compliance with regulatory obligations, and limit the gravity of any contraventions or non-compliance by triggering appropriate behavioural responses.

9.88 For example, if the public becomes aware of a charity misusing funds it is likely that donations to the entity would fall as a response. In severe cases, the ACNC Commissioner may also wish to use other enforcement powers to protect charitable funds.

9.89 Warning notices therefore provide registered entities with greater incentive to comply with regulatory obligations as notices generally have significant implications for an entity's goodwill, revenue, and public engagement.

9.90 The Bill contains safeguards to protect the interests of registered entities and their beneficiaries. The ACNC Commissioner can only issue warning notices if the application clause is satisfied, that is if:

- the ACNC Commissioner has considered the factors listed in subsection 35-10(2) *[subsection 80-5(3)]*; and
- an entity is a federally regulated entity, and the ACNC Commissioner reasonably believes that the entity has

contravened, or is more likely than not to contravene, a provision in the Bill [paragraph 80-5(1)(a)]; or

- an entity is a federally regulated entity, and the ACNC Commissioner reasonably believes that the entity has not complied, or is more likely than not to not comply, with a governance standard [paragraph 80-5(1)(b)]; or
- the ACNC Commissioner reasonably believes that the registered entity has not complied, or is more likely than not to not comply, with an external conduct standard [paragraph 80-5(1)(c)].

9.91 As explained in the general enforcement power section under the heading ‘detailed explanation of the new law’, the ‘reasonably believes’ threshold ensures the ACNC Commissioner only issues warning notices if any reasonable individual provided with the set of information available to the ACNC Commissioner would deem that a particular registered entity has contravened a provision of the Bill, or has failed to comply with a governance standard or external conduct standard.

9.92 Additionally, the ACNC Commissioner is able to issue warning notices in cases where it is ‘more likely than not’ that a registered entity will contravene a provision in the Bill, or where it is more likely than not that the registered entity will not comply with the governance standards or external conduct standards.

9.93 Rumour or mere suspicion on the part of the ACNC Commissioner would not be sufficient to trigger the requirement. The ACNC Commissioner needs to have reliable information which clearly indicates that the registered entity will contravene a provision in the Bill, or will fail to comply with a governance standard or external conduct standard.

9.94 This enables the Commissioner to intervene to prevent contraventions or non-compliance from occurring, and to take action where necessary, such as to proactively protect the charity’s assets before they may be depleted

9.95 Warning notices inform the registered entity of circumstances in relation to the contravention or non-compliance, or the more likely than not contravention or non-compliance. [Paragraph 80-5(2)(a)]

9.96 Warning notices also outline actions that could be taken by the ACNC Commissioner in response to the contravention or case of non-compliance. [Paragraph 80-5(2)(b)]

- 9.97 Warning notices may generally include a:
- description of the relevant provision which the ACNC Commissioner believes the registered entity has or is more likely than not to contravene;
  - description of the governance standard or external conduct standard which the ACNC Commissioner believes the registered entity has or is more likely than not to contravene;
  - actions and activities which in the ACNC Commissioner's view has led to the contravention or non-compliance, or is more likely than not to lead to a contravention or case of non-compliance;
  - actions which the entity should take to address the contravention or case of non-compliance; and
  - the actions, if any, the ACNC Commissioner intends to take if the entity does not address the contravention or case of non-compliance.

## **Directions**

9.98 The ACNC Commissioner has the authority to give a registered entity a written direction to take specified actions. *[Division 85]*

9.99 Directions provide the ACNC Commissioner with a mechanism to direct registered entities to address any actual or highly likely contraventions of provisions to the ACNC Bill, or cases of non-compliance with governance standards or external conduct standards.

9.100 Directions must be given to a registered entity through a written notice. The notice must clearly specify the ground or grounds on which the direction was issued and the period of time the registered entity has in order to comply with the direction. *[Subsection 85-5(3)]*

9.101 The Bill outlines a set of circumstances under which the ACNC Commissioner may issue directions. The circumstances provide a safeguard for the sector and ensure that directions are only issued when there are significant concerns.

9.102 The ACNC Commissioner may issue a direction if the application clause is satisfied; that is, if:

- the entity is a federally regulated entity, and the ACNC Commissioner reasonably believes that the entity has



contravened, or is more likely than not to contravene, a provision in the Bill; or *[Paragraph 85-5(1)(a)]*

- the entity is a federally regulated entity, and the ACNC Commissioner reasonably believes that the entity has not complied, or is more likely than not to not comply, with a governance standard; or *[Paragraph 85-5(1)(b)]*
- the ACNC Commissioner reasonably believes that the registered entity has not complied, or is more likely than not to not comply, with an external conduct standard.  
*[Paragraph 85-5(1)(c)]*

9.103 As explained in relation to the general enforcement powers, the ‘reasonably believes’ threshold ensures the ACNC Commissioner can only issue warning notices if any reasonable individual provided with the set of information available to the ACNC Commissioner would deem that a particular registered entity has contravened a provision of the Bill, or has failed to comply with a governance standard or external conduct standard.

9.104 Additionally, the ACNC Commissioner is able to issue warning notices in cases where it is ‘more likely than not’ that a registered entity will contravene a provision in the Bill, or will fail to comply with a governance standard or external conduct standard.

9.105 This only covers a situation where there is a substantial or significant likelihood of a contravention and would not extend to a situation where there was only a small chance of a contravention occurring

9.106 Rumour or mere suspicion on the part of the ACNC Commissioner would not be sufficient to trigger the requirement. The ACNC Commissioner needs to have reliable information which clearly indicates that the registered entity will contravene a provision in the Bill, or will fail to comply with a governance standard or external conduct standard.

9.107 This enables the Commissioner to intervene to prevent contraventions or non-compliance from occurring, and to take action where necessary, such as to proactively protect the charity’s assets before they may be depleted.

### **Example 9.9**

Make it Better, a registered entity, remunerates its Director with an annual salary of \$3 million. This salary is excessive compared to other

similar registered entities. This suggests that the entity is not being run as a NFP entity. The ACNC Commissioner may issue an direction to Make it Better to act to remedy the situation.

#### **Example 9.10**

The B Good Organisation, a registered entity, has not held an annual meeting for its members in two years. This means that the B Good Foundation could potentially not comply with a governance standard or its governing rules. The ACNC Commissioner may issue a direction to the B Good Organisation to direct it to hold an annual meeting.

#### **Example 9.11**

The Lightbulb Organisation, a registered entity whose purpose is to provide welfare for disadvantaged youths in Western Australia, collects money from donations and sends it to Japan to help victims of a tsunami. The purpose of the Lightbulb Organisation is to provide welfare for disadvantaged youths, not to provide disaster relief overseas. The ACNC Commissioner may issue a direction to the Lightbulb Organisation directing the Organisation to stop sending funds overseas and to redirect funds to its purpose.

9.108 In deciding whether to give a registered entity a direction, and the content of the direction, the ACNC Commissioner must take into account the standard set of matters outlined in the general enforcement powers. *[Subsection 85-5(2)]*

9.109 The ACNC Commissioner must take these factors into account to ensure that any direction, and its content, issued to a registered entity is proportional, adequate and targeted.

#### ***Kinds of direction***

9.110 To issue a direction the ACNC Commissioner has to reasonably believe that the ‘application threshold’ has been satisfied (see above), and that it is necessary to direct an entity to undertake a specified act in order to address the actual or likely contravention, or the actual or likely case of non-compliance. *[Subsection 85-10(1)]*

9.111 The necessity threshold is used to narrow the scope of acts the ACNC Commissioner can direct a registered entity to undertake.

#### **Example 9.12**

The PB Fund has persistently failed to provide the ACNC Commissioner with annual financial statements. The ACNC Commissioner may direct the Fund to complete and provide annual

financial statements to the ACNC Commissioner for the relevant years. The ACNC Commissioner is not able to direct the PB Fund to change other aspects of its operations.

9.112 The ACNC Commissioner is not able to direct a registered entity to undertake a specified act which is unrelated to the contravention or non-compliance.

9.113 This requirement addresses concerns that any open ended enforcement power may allow the ACNC to inappropriately interfere in a registered entity's operations.

### **Example 9.13**

The JRC Fund submits a duty to notify notice which proposes a change to its governing rules that would render it ineligible for registration. The ACNC Commissioner may direct the JRC Fund to not change its governing rules in a specified manner. However, the ACNC Commissioner cannot direct the registered entity to undertake other acts such as appointing an acting responsible entity.

9.114 A specified act may include directing an entity to ensure that a 'shadow' responsible entity does not have any influence over decisions that affect the whole or a substantial part of the business of the registered entity. [*Paragraph 85-10(2)(a)*]

9.115 A 'shadow' responsible entity is an entity that is not formally appointed but has a significant influence over the registered entity's business activities and practices, or over the decisions and actions taken by formally appointed responsible entities. [*Subsection 85-10(3)*]

9.116 In this case, the registered entity is required to take the specified act. If the responsible entities continue to be influenced by the 'shadow' responsible entity when making decisions and taking actions related to the activities of the registered entity, the registered entity would be liable for an offence.

### **Example 9.14**

Helping Australians Ltd is a registered entity which has decided to alter the charitable purpose included in the entity's governing documents. The entity's staff prepare a duty to notify statement in accordance with Division 60 of the ACNC Bill. An individual directs staff to not submit the notice. The ACNC Commissioner is made aware of the situation and directs the entity to put procedures in place to ensure that the activities of the registered entity are no longer influenced by this individual.

9.117 In practice, the responsible entity that continues to be influenced is liable for the offence through Division 180 of the Bill.

9.118 The definition of ‘shadow’ responsible entity adopts the precedence established in the *Corporations Act 2001*. The definition includes an individual:

- who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the registered entity; or
- who has the capacity to affect significantly the registered entity’s financial standing; or
- in accordance with whose instructions or wishes the responsible entities of the registered entity are accustomed to acting (excluding advice given by the individual in the proper performance of functions attaching to the individual’s professional capacity or his or her business relationship with the responsible entities of the registered entity).

9.119 The ACNC Commissioner may also direct a registered entity to not enter into a specified commercial transaction, financial transaction or other transaction, including:

- borrowing any amount;
- repaying any money on deposit or advance;
- paying or transferring any amount or asset to any entity, or creating an obligation (contingent or otherwise) to do so.

*[Paragraph 85-10(2)(b)]*

9.120 This direction is required to protect the assets of registered entities. It provides the ACNC Commissioner with an instrument to move rapidly in cases of fraud and misappropriation.

### **Example 9.15**

The Community Assistance ADFT Fund is a registered charity established for the relief of poverty. The ACNC Commissioner receives intelligence that the entity is being used as a conduit for an elaborate tax avoidance scheme. To ensure charitable funds remain within the sector, the ACNC Commissioner directs the Fund to not pay any amount of funds or assets to any of its affiliated entities over a particular time frame. This direction is required to address the contravention (expending public monies in a manner which is not

consistent with the entity's charitable purpose) and also promotes the objects of the Bill.

9.121 The ACNC Commissioner may specify a particular class of acts or particular classes of acts in a single direction. [*Paragraph 85-10(4)(a)*]

9.122 This ensures that the ACNC Commissioner has flexibility in issuing directions that require multiple acts to be performed by a registered entity.

**Example 9.16**

The responsible entity of the PDMB Trust has entered into ten contracts to transfer assets to other affiliated entities. The ACNC Commissioner has reason to believe that the transfer of assets is likely to be a contravention of this Bill. The ACNC Commissioner may issue a single direction to the registered entity directing the entity to not execute the ten contracts to transfer the assets to the other entities.

9.123 The ACNC Commissioner may make different provisions with respect to different acts or different classes of acts. [*Paragraph 85-10(4)(b)*]

9.124 This ensures that the ACNC Commissioner has flexibility in issuing directions that require multiple and varied acts to be performed by a registered entity.

**Example 9.17**

The responsible entity of the Bell-Swain Memorial Foundation enters into five contracts that the ACNC Commissioner believes contravene this Bill. The ACNC Commissioner may issue a single direction that directs the responsible entity to not execute four contracts, and to change the details of one contract so that it does not contravene the Bill.

9.125 Directions issued by the ACNC Commissioner in relation to the payment or transfer of money do not override an order of a court or a process of execution. [*Subsection 85-10(5)*]

9.126 Registered entities issued with a direction are required to comply with the direction despite any clauses or provisions in governing rules or contracts the entity has entered into. [*Section 85-15*]

9.127 This ensures that a registered entity can comply with a direction issued by the ACNC Commissioner even if its governing rules or if any contract or arrangement to which the entity is a party would prevent the entity from complying with the direction.

9.128 The Commissioner may issue such a direction in the case where the registered entity is already contravening its governing rules.

***Variation and revocation of directions***

9.129 Directions can generally be used by the ACNC Commissioner as short term instruments to direct an entity to undertake a specified act in order to address the actual or likely contravention, or the actual or likely case of non-compliance.

9.130 Directions remain in force until the expiration of the time period specified in the direction notice, or until the ACNC Commissioner revokes the direction.

9.131 The ACNC Commissioner may, by notice in writing to the registered entity, vary or revoke the direction, if he or she considers the variation necessary and appropriate. *[Subsections 85-20(1) and 85-20(3)]*

9.132 In deciding whether to vary or revoke a direction, the ACNC Commissioner must take into account the matters set out in subsection 35-10(2). *[Subsections 85-20(2) and (4)]*

9.133 The ACNC Commissioner may use this authority in situations where a registered entity has addressed the contravention or non-compliance by taking the specified act in the direction notice.

**Example 9.18**

The ACNC directs a registered entity to ensure that a shadow responsible entity does not influence the business activities of the registered entity. The shadow responsible entity's contract expires and he parts ways with the registered entity. In this case the ACNC Commissioner revokes the direction as there is no longer a threat that the shadow responsible entity will influence the activities of the entity.

9.134 If the ACNC Commissioner does not amend or revoke the enforceable direction for a period of 12 months after it was issued the ACNC Commissioner must consider within a reasonable time after the end of the 12 months whether it would be reasonable to vary or revoke the direction. *[Subsections 85-20(5) and 85-20(6)]*

9.135 As noted above, directions are generally used as short term instruments. The required statutory review ensures the ACNC Commissioner reconsiders the appropriateness of directions at the later time.

9.136 In certain situations, it is possible that the other enforcement powers, such as the removal of responsible entities may be better suited to achieve the intended outcomes.

### ***Objections***

9.137 If a registered entity is dissatisfied with the decision taken by the ACNC Commissioner to:

- give a direction,
- vary a direction, or
- not vary or revoke a direction after a 12 month period has passed,

the registered entity may seek to review or appeal the ACNC Commissioner's decision. [*Section 85-25*]

9.138 Further information on the reviews and appeals procedure can be found in Chapter 12 – Review and appeal.

### ***Non-compliance with a direction***

9.139 A registered entity must comply with a direction issued by the ACNC Commissioner within the timeframes specified in the direction notice.

9.140 If a registered entity does an act, or fails to do an act, and doing or failing to do the act results in a contravention of a direction, the registered entity commits an offence. [*Subsection 85-30(1)*]

9.141 A separate offence is committed on each day that the registered entity fails to comply with the direction issued by the ACNC Commissioner. The maximum penalty for each offence is 40 penalty units. [*Subsection 85-30(2)*]

9.142 Where a body corporate is convicted of an offence for failing to comply with a direction issued by the ACNC Commissioner, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to five times the maximum penalty of 40 penalty units. [*Subsection 85-30(2)*]

9.143 These penalties are lower than those of other Commonwealth regulators that have the power to issue directions, including section 11CG of the *Banking Act 1959* administered by APRA.

## **Enforceable undertakings**

9.144 Enforceable undertakings are court-enforceable agreements voluntarily entered into by the ACNC Commissioner and a registered entity.

9.145 A written undertaking specifies an action or a series of actions that a registered entity has agreed to take, or refrain from taking, in order to comply with a provision that is enforceable. *[Division 90]*

9.146 Enforceable provisions are:

- a provision of this Bill;
- governance standards or external conduct standards; and
- a provision of a legislative instrument made under this Bill.

### *[Subsection 90-5]*

9.147 Enforceable undertakings have successfully been employed as an alternative to other enforcement actions by Australian regulators to influence behaviour.

9.148 The standard application and necessity clauses outlined above do not apply to enforceable undertakings. Instead, a modified application clause applies, as there does not need to be a contravention or case of non-compliance for the ACNC Commissioner to enter into an enforceable undertaking.

9.149 The ACNC Commissioner must make information relating to enforceable undertakings available to the public through the ACN Register. *[Note in subsection 90-10(3)]*

### *Acceptance of undertakings*

9.150 The ACNC Commissioner has authority to accept enforceable undertakings relating to the powers or functions under the Bill. *[Section 90-10]*

9.151 The ACNC Commissioner is able to accept a written undertaking from a registered entity that is a federally regulated entity, specifying that the entity will:

- take specified action or refrain from taking specified action to comply with an enforceable provision; and



- take specified action to ensure that the entity does not contravene or is more likely than not to not contravene an enforceable provision in the future.

*[Subsection 90-10(1)]*

9.152 The ACNC Commissioner is also able to accept a written undertaking from any registered entity specifying that the entity will:

- take specified action or refrain from taking specified action to comply with an external conduct standard; and
- take specified action to ensure that the entity does not contravene or is unlikely to contravene an external conduct standard in the future.

*[Subsection 90-10(2)]*

9.153 The modified application clause allows the ACNC Commissioner to accept a written undertaking when there has, or there is likely to be, a contravention, or situations where there has been no contravention but an entity wants to make changes to ensure it does not contravene an enforceable provision or external conduct standard in the future.

9.154 Any undertaking agreed to by the ACNC Commissioner must be expressed to be an enforceable undertaking under Division 90 of the Bill for the undertaking to have effect. *[Subsection 90-10(3)]*

9.155 The registered entity which entered into the enforceable undertaking may withdraw or vary the undertaking at any time, but only with the consent of the ACNC Commissioner. *[Subsection 90-10(4)]*

9.156 The ACNC Commissioner may cancel the undertaking by giving written notice to the registered entity. *[Subsection 90-10(6)]*

**Example 9.19**

The PMB Memorial Foundation enters into an enforceable undertaking with the ACNC Commissioner. The Foundation agrees to comply with a voluntary governance standard. After a change in circumstances, the Foundation decides that it will withdraw from the enforceable undertaking so that it does not need to comply with the voluntary governance standard. The ACNC Commissioner gives consent for the Foundation to withdraw from the enforceable undertaking. The Foundation is no longer required to comply with the voluntary governance standard.

9.157 The written consent of the ACNC Commissioner is not a legislative instrument within the meaning of Section 5 of the *Legislative Instruments Act 2003*. [Subsection 90-10(5)]

***Enforcement of undertakings***

9.158 If the ACNC Commissioner considers that a registered entity has breached any of the terms of an enforceable undertaking, the ACNC Commissioner may apply to a ‘designated court’ to have the undertaking enforced. [Subsection 90-15(1)]

9.159 ***Designated court*** includes the Federal Court of Australia, or a Supreme Court of any State or Territory.

9.160 A ‘designated court’ may issue an order directing a registered entity to comply with the terms of an enforceable undertaking only if the Court is satisfied that:

- the registered entity has breached the enforceable undertaking;
- the entity continues to be registered by the ACNC; and
- if the undertaking relates to an enforceable provision, excluding the external conduct standards, the entity continues to be a federally regulated entity.

[Subsection 90-15(2)]

9.161 If the latter two requirements are not satisfied the ACNC Commissioner is not authorised to accept the undertaking, therefore, a ‘designated court’ does not have the authority to enforce the undertaking.

9.162 If all the requirements are satisfied, a court may use relevant judicial powers to order a registered entity to comply with the terms agreed to in the undertakings. Providing a court with the power to enforce undertakings is necessary to provide entities with the required incentive to comply with the undertaking.

9.163 The orders that a court may make are outlined below. Failure to comply with an order of a court is a criminal offence.

9.164 A court may order a registered entity to comply with the undertaking. This order ensures that the registered entity takes or refrains from taking the actions agreed to in the undertaking. [Paragraph 90-15(3)(a)]

9.165 A court may order a registered entity to pay to the Commonwealth an amount up to the amount of any financial benefit that the entity has obtained directly or indirectly and that is reasonably attributable to the breach. *[Paragraph 90-15(3)(b)]*

9.166 The possibility of issuing this order limits the financial incentive associated with breaching undertakings.

**Example 9.20**

Camp for Youths Ltd is a registered charity that has agreed to an undertaking to avoid revocation of registration. The charity continues to access tax concessions. Through its monitoring power, the ACNC Commissioner finds that the entity has not complied with the undertaking and has inappropriately maintained its registration and access to concessions. A court orders the entity to repay the financial benefit, in this case the amount of tax the entity did not pay by virtue of its registration, gained as a result of the breach.

9.167 The ACNC Commissioner may apply to a court for an order directing the entity to compensate any third party that has suffered loss or damage as a result of the breach. *[Paragraph 90-15(3)(c)]*

9.168 This type of order is required to ensure that third parties that suffer a financial or physical loss or damage as a result of the breach are adequately compensated.

**Example 9.21**

The PBusta Foundation maintains deductible gift recipient status as a result of registration. Individual donors can claim an income tax deduction for donations made to the Foundation. The ACNC Commissioner finds that the Foundation has breached the terms of an undertaking and revokes the entity's registration retrospectively.

Based on ACNC registration, the ATO also revokes the entity's endorsement as a deductible gift recipient retrospectively. Individuals that claimed an income tax deduction for donations made to the Foundation could in theory be required to repay the tax deductions they claimed.

In this situation the Foundation may have to compensate an individual who has a tax liability as a result of the breach.

9.169 The ACNC Commissioner may apply to a 'designated court' for an order that the 'designated court' considers appropriate. *[Paragraph 90-15(3)(d)]*

9.170 The court will be able to order the registered entity to do anything which is not covered by the other orders in this Chapter, in order to undo or rectify the consequences of the breach.

## **Injunctions**

9.171 The ACNC Commissioner has the authority to apply for injunctions to restrain registered entities from contravening an enforceable provision, or to compel compliance with an enforceable provision.

*[Division 95]*

9.172 An injunction generally specifies actions which a person is required to take, or is required to refrain from taking, in order to become compliant with enforceable provisions.

9.173 The definition of person in the Bill includes all legal persons (such as registered entities) that can legally own or have property vested in their person.

9.174 Injunctions can generally be sought by the ACNC Commissioner in circumstances where:

- a registered entity has engaged in serious and persistent contraventions and court involvement is desirable; or
- the ACNC needs to move rapidly to ensure that public monies are used appropriately.

9.175 Injunctions can also be used in circumstances where a registered entity has not complied with a direction notice which has been issued by the ACNC Commissioner under Division 85 of the Bill.

9.176 Enforceable provisions are:

- a provision of this Bill;
- governance standards or external conduct standards; and
- a provision of a legislative instrument made under this Bill.

*[Section 95-5]*

9.177 The standard application and necessity clauses apply to injunctions. Consistent with the application clause that applies to the other enforcement powers of the ACNC Commissioner, the ACNC Commissioner may only apply to a court, and the court may only grant an injunction or an interim injunction if:

- the injunction or interim injunction relates to a registered entity that is a federally regulated entity; or
- the injunction or interim injunction relates to an external conduct standard.

*[Section 95-10]*

9.178 The application requires that injunctions are only issued to federally regulated entities, unless the injunction is issued to ensure that an entity is compliant with an external conduct standard. In the latter case the injunction can be issued to any registered charity.

9.179 A court issuing injunctions under Division 95 of the Bill must take into account the object of this Bill. The objects of the Bill must be considered when coming to a view on whether to issue an injunction and on the content of the injunction. *[Section 95-35]*

9.180 Division 95 of the Bill provides courts with the authority to remove or vary any injunction that has been issued by courts under this Division. *[Section 95-25]*

***Grant of injunctions***

*Restraining injunctions*

9.181 The ACNC Commissioner has the authority to apply to a court for a restraining injunction. *[Section 95-15]*

9.182 Restraining injunctions can be used where a person has engaged or is proposing to engage in conduct that can be deemed a contravention of an enforceable provision. *[Subsection 95-15(1)]*

9.183 The standard necessity clause applies to injunctions as a court is only able to issue injunctions to:

- restrain the person from engaging in the conduct deemed to have contravened an enforceable provision; and
- require a person to do a thing if it is desirable to do the thing in order to address the contravention.

*[Subsection 95-15(1)]*

**Example 9.22**

The Fairsight Foundation is a registered entity. The ACNC Commissioner through its monitoring power has obtained a copy of the

employment contract under which one of the responsible entities is been engaged. The contract enables the responsible entity to receive large bonuses which is inconsistent with the entity's charitable purpose. The ACNC Commissioner applies for an injunction to restrain the registered entity from acting in the manner which would result in a contravention of an enforceable direction. The injunction can only be used to restrain the action which would lead to a contravention and cannot be used to influence the operations of the foundation.

9.184 The power of a relevant court to grant restraining injunctions may be exercised:

- whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind [paragraph 95-30(1)(a)];
- whether or not the person has previously engaged in conduct of that kind [paragraph 95-30(1)(b)]; and
- whether or not there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind [paragraph 95-30(1)(c)].

9.185 This is intended to make it clear that a court is able to issue an injunction:

- where a person has engaged in the conduct in the past and apparently does not intend to engage in this conduct again;
- in cases where the person under question has not previously engaged in the conduct; or
- if the implications of engaging in the conduct, for other entities, are relatively minor.

#### *Performance injunctions*

9.186 The ACNC Commissioner has the authority to apply to a court for a performance injunction. [Section 95-15]

9.187 Performance injunctions can be used where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail to do a thing that ensures the person would comply with enforceable provisions. [Subsection 95-15(2)]

9.188 The standard necessity clause applies to performance injunctions as a court is only able to issue injunctions requiring the person to do the

thing which would ensure compliance with enforceable provisions.  
[Subsection 95-15(2)]

**Example 9.23**

Helpers Inc is a registered entity. The entity has refused, and is continuing to refuse, to develop and put in place processes which ensure that the registered entity is promoting the charitable purpose for which it was registered. The ACNC Commissioner has issued warning notices to the entity which have been ignored. The ACNC Commissioner applies to a court for a performance injunction which requires that the entity put in place appropriate processes.

9.189 The power of a relevant court to grant performance injunctions may be exercised:

- whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that thing [paragraph 95-30(2)(a)];
- whether or not the person has previously refused or failed to do that thing [paragraph 95-30(2)(b)]; and
- whether or not there is an imminent danger of substantial damage to any other person if the person refuses or fails to do that thing [paragraph 95-30(2)(c)].

9.190 This ensures that a court is able to issue an injunction where:

- a person has failed to do a thing in the past and apparently does not intend to fail to do the thing again;
- in cases where the person under question has not previously refused or failed to do that thing; or
- if the implications of refusing or failing to do the thing, for other entities, are relatively minor.

*Consent injunctions*

9.191 A court has the authority to grant consent injunctions.  
[Subsection 95-15(3)]

9.192 Consent injunctions can be used where the ACNC Commissioner has begun the process of applying for a restraining injunction or a performance injunction, and all the parties involved have agreed to the course of action.

9.193 The court does not have to be satisfied that the person has contravened, or will contravene, an enforceable provision.  
*[Subsection 95-15(3)]*

#### **Example 9.24**

The TYX Trust is registered by the ACNC. New trustees have been appointed and discover that previous trustees engaged in practices that have contravened enforceable provisions. The ACNC Commissioner and the new trustees agree on a course of action and apply to a court for a consent injunction. The injunction puts a halt to the activities which led to the contravention while the new trustees and the ACNC Commissioner develop longer term solutions to address any shortcomings in the trust's operational framework.

#### *Interim injunction*

9.194 The ACNC Commissioner may apply for an interim injunction pending determination of an application for either a restraining or performance injunction. *[Subsection 95-20(1)]*

9.195 A relevant court may grant an interim injunction:

- restraining a person from engaging in conduct; or
- requiring a person to do a thing.

9.196 Interim injunctions are required to ensure the ACNC can rapidly move to protect charitable assets on a temporary basis prior to the agreement of more permanent arrangements.

9.197 The court must not require the ACNC Commissioner to give an undertaking for damages as a condition of granting an interim injunction.  
*[Subsection 95-20(2)]*

9.198 The powers conferred on a court under Division 95 are in addition to, and not instead of, any other powers of the court.  
*[Section 95-40]*

### **Suspension and removal of responsible entities**

9.199 The ACNC Commissioner has the power to remove or suspend responsible entities, and to appoint acting responsible entities.  
*[Division 100]*

9.200 The standard application and necessity clauses apply to the ACNC Commissioner's power to remove or suspend responsible entities.  
*[Section 100-5]*



9.201 The ACNC Commissioner generally has the authority to remove or suspend responsible entities of federally regulated registered entities. Where the non-compliance or likely non-compliance relates to an external conduct standard, the ACNC Commissioner has the authority to remove or suspend a responsible entity of any registered entity. *[Subsection 100-5(1)]*

9.202 In the same manner as the other enforcement powers discussed above, a rumour or mere suspicion on the part of the ACNC Commissioner would not be sufficient to be considered to be more likely than not. Rather, the Commissioner needs reliable and accurate evidence which clearly indicates that there will be a contravention in order to meet this test.

9.203 The ACNC Commissioner does not have the authority to remove or suspend responsible entities of an incapacitated entity, which includes a receiver, a liquidator, an administrator of a deed of company arrangement, a trustee in bankruptcy or other entity administering a compromise arrangement between the registered entity and someone else (see section 205-30(c) for a definition). *[Subsection 100-5(2)]*

9.204 Incapacitated entities fall under the regulatory oversight of the ASIC or the Insolvency and Trustee Service Australia (ITSA).

9.205 ASIC and ITSA have established appropriate expertise to deal with these entities as they relate to for-profit and NFP entities. Therefore, this function appropriately remains under the purview of ASIC and the ITSA.

9.206 The ACNC Commissioner does not have the authority to remove or suspend responsible entities of a basic religious charity. *[Subsection 100-5(3)]*

9.207 The ACNC Commissioner must make information relating to the removal or suspension of responsible entities available to the public through the ACN Register. *[Note in subsection 100-5(3)]*

9.208 For further information about the publishing of information on the ACN Register see Chapter 4 – Australian Charities and Not-for-profits Register.

9.209 The *Scoping Study for a National Not-for-profit Regulator* process found that there was sector support for responsibility for the supervision of charitable trusts to be undertaken by a national regulator.

9.210 Unlike State Attorneys-General, who currently have the responsibility for supervising charitable trusts, the ACNC has both supervisory and investigatory powers in relation to registered entities.

These powers allow the ACNC Commissioner the means to investigate claims of misconduct and contraventions of the Bill, and to gather evidence if necessary.

9.211 Affording the ACNC Commissioner the power to suspend or remove trustees, in appropriate circumstances, moves this power from being a judicial function to a regulatory function.

9.212 There are a number of benefits to this movement. Firstly, a regulator can ensure that the approach taken is proportional in the circumstances. Secondly, a regulator can act in a timely manner, without the need for lengthy court proceedings. Thirdly, the decisions of regulators are subject to an appropriate review and appeal process throughout the levels of the judicial system. Finally, a regulator can provide more cost-effective and accessible redress, negating the need for costly court proceedings. This ensures that the beneficiaries of charitable trusts have improved access to justice.

9.213 The movement of this function from the judiciary to the executive is reflected in reforms that have occurred internationally, and is a movement that is progressively being adopted in Australia. For example, APRA has the power to suspend or remove trustees of most superannuation funds and the Commissioner of Taxation has these powers in relation to self-managed super funds and charitable ancillary funds. Allowing the ACNC Commissioner, as the regulator of the NFP sector, to suspend or remove trustees brings Australia into line with international best practice.

### ***Suspension of responsible entities***

9.214 The ACNC Commissioner is only able to suspend a responsible entity if the necessity clause has been satisfied.

9.215 Thus, the ACNC Commissioner needs to consider whether suspending a responsible entity is necessary to address the contravention or non-compliance (or prevent more likely than not contravention or non-compliance). [*Subsection 100-10(1)*]

### **Example 9.25**

Shadys Ltd is a registered charity established to provide subsidised housing for the direct relief of poverty. The entity has several responsible entities. One of these entities is a director of a for-profit affordable housing provider that competes with the charity in the affordable housing segment of the market. This responsible entity has a clear conflict of interest in this situation and may therefore not be promoting the purposes for which the charity was registered.

The entity continues to function in its capacity as a responsible entity, as such; the registered entity may not be complying with regulatory obligations. To address this case of non-compliance the ACNC Commissioner could suspend the responsible entity.

9.216 The ACNC Commissioner must give the responsible entity written notice setting out the decision to suspend it. The written notice must set out the ACNC Commissioner's decision, provide reasons for the decision and set out the time the suspension ends. *[Subsection 100-10(3)]*

9.217 Before suspending or removing a responsible entity the ACNC Commissioner must give a show cause notice to the registered entity that states the grounds on which the ACNC Commissioner has made his or her decision and which invites the registered entity to respond within 28 days. *[Subsections 100-10(4) and (5) and subsections 100-15(3) and (4)]*

9.218 The ACNC Commissioner is not required to give a show cause notice, or to wait for a response to a show cause if, taking into account the matters in 35-10(2), more immediate action is necessary. *[Subsections 100-10(6) and 100-15(5)]*

9.219 The suspension of a responsible entity starts when the ACNC Commissioner gives the responsible entity notice of his or her decision to suspend the entity. *[Subsection 100-10(2)]*

9.220 The ACNC Commissioner may change the end time of the suspension. *[Subsection 100-10(7)]*

9.221 The ACNC Commissioner is required to give the responsible entity a written notice setting out a decision to extend the suspension, providing reasons for the decision and setting out the new time the suspension ends. *[Subsection 100-10(8)]*

### ***Removal of responsible entities***

9.222 The ACNC Commissioner can only remove a responsible entity if the necessity clause has been satisfied.

9.223 Thus, the ACNC Commissioner needs to consider whether removing a responsible entity is necessary to address the contravention or non-compliance (or prevent the more likely than not contravention or non-compliance). *[Subsection 100-15(1)]*

### **Example 9.26**

Continuing from example 9.25 above, if the suspended individual returns to his position as a responsible entity once the suspension period ends, and the registered entity, through the remaining

responsible entities, has not put in place appropriate processes to manage this conflict of interest and ensure the entity is promoting the purposes for which the charity was registered, the ACNC Commissioner can remove the responsible entity to address the case of non-compliance.

9.224 The ACNC Commissioner must give the responsible entity written notice setting out his or her decision to remove the responsible entity. The written notice must set out the ACNC Commissioner's decision and provide reasons for the decision. *[Subsection 100-15(2)]*

***Matters ACNC Commissioner must take into account***

9.225 The ACNC Commissioner is required to consider the standard range of matters outlined in subsection 35-10(2) prior to suspending or removing responsible entities. *[Subsections 100-10(9) and 100-15(6)]*

9.226 The matters that are required to be considered ensure that the ACNC Commissioner balances a range of different considerations when forming a view on appropriate enforcement actions.

9.227 The matters include factors which would help ensure that, where possible, other options to help promote compliance are considered before a responsible entity is removed or suspended.

9.228 In some situations, such as in relation to minor non-compliance and where other mechanisms such as warning notices or enforceable undertakings are available, it may not be appropriate to suspend or remove a responsible entity.

9.229 In other situations the removal or suspension of responsible entities may be necessary, even where other enforcement actions are available to the ACNC Commissioner and have not been taken.

9.230 For example, the suspension or removal of a responsible entity may be necessary where a registered entity has significantly and persistently contravened the law and there is a significant risk that assets may be applied in an inappropriate manner.

***Review of decisions***

9.231 A responsible entity that is dissatisfied with the ACNC Commissioner's decision to remove or suspend (or change the time a suspension of the responsible entity ends) may object against the decision in the manner set out in Part 7-2. *[Subsections 100-10(10) and 100-15(7)]*

9.232 For further information on the review and appeal procedures see Chapter 12 – Review and appeal.

***Effect of suspension or removal***

9.233 A responsible entity that has been suspended cannot become a responsible entity of the registered entity until the suspension ends. [Subsection 100-20(1)]

9.234 A responsible entity that has been removed cannot become a responsible entity of the registered entity. [Subsection 100-20(2)]

9.235 When a responsible entity is removed or suspended, the responsible entity is removed or suspended *only* from the position or office which led the entity to be considered a responsible entity for the purposes of this Bill. [Subsection 100-20(1) and subsection 100-20(2)]

9.236 The relevant positions or offices are outlined in the definition of ‘responsible entity’ and include:

- in the case where the registered entity is a company — a director of the registered entity; or
- in the case where the registered entity is a trust — a trustee of the registered entity, and if a trustee is a body corporate, a director of the trustee.

9.237 Where the suspended or removed responsible entity is a director of a registered entity, or a director of a corporate trustee, the individual ceases to be to be a director of the company or trustee, indefinitely for the case of a removal, or in the case of suspension, until the suspension ends. [Subsection 100-20(3)]

9.238 This ensures that a removed or suspended responsible entity cannot be reappointed (prior to the end of the suspension) after the removal or suspension.

9.239 The provision also clarifies that the suspended or removed responsible entity can continue to function, or work, for the registered entity in another capacity if considered appropriate.

**Example 9.27**

Holdspoint primary is a NFP school which is registered by the ACNC. The registered charity has contravened a provision of the Bill and the ACNC Commissioner decides to suspend one of the schools responsible entities (the Principal of the school who is also a Director) in order to address the contravention. The Principal will continue to be able to teach and provide other educative services related to the role of school Principal, however, this individual would not be able to function as a Director of the school until the suspension period ends.

9.240 A removed or suspended responsible entity is generally not able to function as a responsible entity of another registered entity during the period of suspension or removal, if the appointment would result in the other registered entity contravening a governance standard.

9.241 A suspended or removed responsible entity commits an offence if the responsible entity makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the registered entity. *[Subsection 100-25(1)]*

9.242 The maximum penalty for this offence is 50 penalty units or imprisonment for one year, or both. *[Subsection 100-25(1)]*

### **Example 9.28**

The XAY Inc is a registered charity that has had one of its responsible entities suspended. The responsible entity no longer formally holds the office of Director but continues to attend Board meetings and participate in making Board decisions that affect substantial parts of the registered entity's business. Under this section the responsible entity would have committed an offence and may be liable for a penalty.

9.243 A suspended or removed responsible entity commits an offence if the responsible entity exercises the capacity to significantly affect the registered entity's financial standing. *[Subsection 100-25(2)]*

9.244 The maximum penalty for this offence is 50 penalty units or imprisonment for one year, or both. *[Subsection 100-25(2)]*

### **Example 9.29**

Camp Farah Ltd is a registered charity which has had one of its Directors removed by the ACNC. The Director that was removed continues to work for the entity in a different capacity. The ACNC is made aware that the individual continues to influence the decisions and strategies of the working group of the Board of Directors by influencing the views of the remaining responsible entities. Decisions taken by the working group relate to the entity's long-term funding and investment plan, which significantly affects the registered entity's financial standing and position. The individual is liable to an offence.

### **Example 9.30**

The Campo Foundation is an ancillary fund registered by the ACNC. The Foundation is a federally regulated entity with all of its trustees being constitutional corporations. The ACNC Commissioner removes one of the Directors of one of the trustees. The suspended individual continues to work for the trustee in a different capacity and is responsible for managing the stationery inventory of the corporations

including the payments for stationery. In this case the individual's decisions will have a minor effect on the entity's financial standing.

9.245 An offence is committed by a suspended or removed responsible entity, that is an individual who communicates instructions or wishes to the responsible entities of the registered entity:

- knowing that responsible entities are accustomed to act in accordance with the suspended or removed individual's instructions or wishes; or
- intending that those responsible entities will act in accordance with those instructions or wishes; and
- the communication of those instructions or wishes is not advice given by the entity in the proper performance of functions attaching to the entity's professional capacity or his or her business relationship with the responsible entities of the registered entity. [*Subsection 100-25(3)*]

9.246 The maximum penalty for this offence is 50 penalty units or imprisonment for one year, or both. [*Subsection 100-25(3)*]

### **Example 9.31**

PCA Help Ltd is a registered charity which has had one of its Directors suspended by the ACNC. The ACNC is made aware that the individual continues to influence the decisions of the Board of Directors by influencing the views of responsible entities. The responsible entities of the entity are accustomed to act in accordance with the suspended Director's instructions and the Director communicates the instructions with a view to compelling the responsible entities to act in accordance with instructions. The individual has committed an offence.

9.247 Offences included in this section of the Bill are strict liability offences as defined in section 6.1 of the *Criminal Code*. [*Subsection 100-25(4)*]

9.248 The offences ensure that responsible entities are strictly liable for their actions that are taken to influence (directly or indirectly through other responsible entities) the whole or a substantial part of the registered entity's business or financial standing (that is, liable regardless of fault).

9.249 This liability has been established to compel responsible entities which have already been removed on the grounds of misconduct to refrain from influencing the activities of the registered entity in order to ensure

the registered entity addresses the contravention or case of non-compliance.

9.250 It is expected that the ACNC Commissioner only takes action to remove or suspend a responsible entity in situations that involve serious contraventions or non-compliance.

***If a responsible entity is removed or suspended***

9.251 The ability to appoint an acting responsible entity provides the ACNC Commissioner with the power to ensure that registered entities are able to operate effectively and continue to promote their charitable purpose when responsible entities have been suspended or removed.

9.252 If the ACNC Commissioner removes or suspends one or more responsible entities, the ACNC Commissioner has the authority to appoint one or more persons (acting responsible entities) to undertake the duties of the responsible entity during the period of suspension or until a permanent replacement responsible entity is appointed. *[Subsections 100-30(1) and 100-30(3)]*

9.253 If the ACNC Commissioner removes or suspends all of a registered entity's responsible entities, the ACNC Commissioner is required to appoint one or more persons (acting responsible entities) to act in the place of the suspended or removed entities during the period of the suspension or until at least one of the vacancies created by the removal or suspension is filled. *[Subsections 100-30(2) and 100-30(4)]*

9.254 To clarify, the ACNC Commissioner is required to appoint a director of a corporate trustee if the corporate trustee is a responsible entity of a trust which is a registered entity, and the ACNC Commissioner suspends all of the directors of the trustee.

9.255 The ACNC Commissioner is also required to appoint an acting responsible entity where all trustees of the trust have been suspended or removed.

**Example 9.32**

A registered entity has two responsible entities, both of which are corporate trustees. The ACNC Commissioner suspends all of the directors of one of the corporate trustees.

While the registered entity still has one of the responsible entities, suspending all the directors of one of the corporate trustees leaves it with no directors. The ACNC Commissioner is therefore required to appoint an acting director of the corporate trustee.



9.256 The ACNC Commissioner has discretion to determine the number of responsible entities that will be appointed to ensure the effective operations of the registered entity. This may include a minimum number of directors as specified in other laws, for example the *Corporations Act 2001*.

9.257 Where the ACNC Commissioner suspends or removes a responsible entity of a trust which is a 'federally regulated entity', to the extent possible, the ACNC Commissioner generally looks to appoint a constitutional corporation to fill any vacancy that results from the suspension or removal of responsible entities. [*Subsection 100-35(1)*]

9.258 Additionally, the ACNC Commissioner will strive to appoint the same type of constitutional corporations. [*Subsection 100-35(2)*]

9.259 Constitutional corporations include financial corporation, a trading corporation or a foreign corporation, and a body corporate that is incorporated in a Territory. [*Section 205-20*]

9.260 The ACNC Commissioner may appoint a person that is not a constitutional corporation if it is not practical to appoint a person that is a constitutional corporation. [*Subsection 100-35(3)*]

9.261 In cases where the ACNC Commissioner is unable to appoint the same type of constitutional corporation, an acting responsible entity is only able to act as a responsible entity for a maximum period of 6 months. [*Subsection 100-35(4)*]

9.262 This may be required when the ACNC Commissioner wants the acting responsible entity to be a government authority or an incapacitated entity.

9.263 The ACNC Commissioner has the authority to determine the terms and conditions of the appointment of the acting responsible entities. The determination has effect despite anything in any Australian law the registered entity's governing rules or the governing rules of a corporate trustee. [*Subsection 100-40(1)*]

9.264 The ACNC Commissioner generally requires that the acting responsible entities' fees are to be paid out of the assets of the registered entity including the assets of a trust. This is required as the acting responsible entity provides the registered entity with a service from which the registered entity benefits. [*Subsection 100-40(2)*]

9.265 The ACNC Commissioner may terminate the appointment of an acting responsible entity at any time. [*Section 100-45*]

9.266 This authority enables the ACNC Commissioner to remove an acting responsible entity if required. For example, the ACNC Commissioner may want to remove an acting trustee to appoint an incapacitated entity if circumstances so require.

9.267 An acting responsible entity may resign by writing given to the ACNC Commissioner. The resignation does not take effect until the end of the seventh day after the day on which the notice was given to the ACNC Commissioner. *[Section 100-50]*

9.268 The acting responsible entities may exercise all the rights, title and powers, and must perform all the functions and duties, of the removed or suspended responsible entities. *[Subsection 100-55(1)]*

9.269 The registered entity's governing rules (and, if the suspended or removed responsible entities were directors of a trustee of the registered entity, the governing rules of the trustee), and every Australian law that applies in relation to the acting responsible entities as if the acting responsible entities were a director, or a trustee. *[Subsection 100-55(2)]*

9.270 This ensures that the responsible entities are able to function effectively as responsible entities and do all that is required or possible for the registered entity to fulfil its charitable purpose.

9.271 The ACNC Commissioner may give a written notice directing an acting responsible entity to do, or not to do, one or more specified acts or things in relation to the registered entity. *[Subsection 100-60(1)]*

9.272 These powers ensure that the ACNC Commissioner has the power to address the contravention or case of non-compliance which led to the removal or suspension of responsible entities.

9.273 Such directions are provided to the acting trustee so that they are aware of the contravention or case of non-compliance which led to the suspension and removal and can therefore act to address the problem.

9.274 An acting responsible entity commits an offence if the registered entity engages in conduct which contravenes a notice given by the ACNC Commissioner. *[Subsection 100-60(2)]*

9.275 The maximum penalty attached to this offence is 40 penalty units. *[Subsection 100-60(2)]*

9.276 This section does not affect the validity of a transaction entered into in contravention of a notice given under subsection. *[Subsection 100-60(3)]*

9.277 This is required to ensure any arrangements or agreements are still valid even though this may contravene the direction to do or not do an act given by the ACNC Commissioner to the acting responsible entity.

9.278 Furthermore, it protects parties relying in good faith on a valid appointment.

***Special provisions about acting trustees***

9.279 If the ACNC Commissioner appoints an acting responsible entity to act in the place of a suspended or removed trustee of the registered entity, the ACNC Commissioner must make a written order vesting the property of the registered entity in the acting responsible entity. *[Subsection 100-65(1)]*

9.280 If the appointment period ends, the ACNC Commissioner must make a written order vesting the property of the registered entity in the new acting responsible entity, the previously suspended trustee or trustees, or the new permanent trustee or trustees (whichever is applicable). *[Subsection 100-65(2)]*

9.281 If the ACNC Commissioner makes an order under this Bill vesting property of a registered entity in a person or persons, generally the property immediately vests in the acting responsible entities appointed by the ACNC Commissioner. *[Subsection 100-65(3)]*

9.282 If the assets or property held by the trust is of a kind whose transfer or transmission may be registered under an Australian law; and the law:

- enables the registration of such an order; or
- enables the person or persons to be registered as the owner or owners of that property;

the property does not vest in the person or persons until the requirements of the law referred to are complied with.

*[Subsection 100-65(4)]*

9.283 If the ACNC Commissioner makes a property vesting order to vest the property of a registered entity in an acting responsible entity, the former trustee or former trustees are required to give the acting responsible entity all books relating to the registered entity's affairs that are in the former trustee's or former trustees' possession, custody or control. *[Subsections 100-70(1) and (2)]*

9.284 If the former trustee or former trustees do not, within 14 days of the ACNC Commissioner making the property vesting order, comply with the requirement to give the acting responsible entity all books relating to the registered entity's affairs, the entity commits an offence.

*[Paragraph 100-70(1)(c)]*

9.285 The maximum penalty for this offence is 50 penalty units.

*[Paragraph 100-70(1)(c)]*

9.286 This is required to ensure that the acting responsible entity has all the information required to effectively manage the affairs of the trust. Without the books of the trust, the acting responsible entity is unaware of the financial position and performance and related information required to formulate an appropriate business strategy for the trust.

9.287 If the ACNC Commissioner makes a property vesting order to vest the property of a registered entity in an acting responsible entity, the acting responsible entity may, by notice in writing to the former trustee or former trustees, require the trustee or trustees:

- to identify property of the registered entity; and
- to explain how the former trustee or former trustees have kept account of that property.

*[Subsection 100-70(3)]*

9.288 The former trustee(s) commit an offence if they fail to comply with the requirement in the notice within 28 days of the notice being given. *[Subsection 100-70(5)]*

9.289 The maximum penalty for this offence is 50 penalty units.

*[Subsection 100-70(5)]*

9.290 The acting responsible entity may also require the former trustee or former trustees to take specified action to transfer property vested in the former trustee or former trustees to the acting responsible entity.

*[Subsection 100-70(4)]*

9.291 This provision only covers properties that are vested in the former trustee(s) which are vested in this trustee(s) by virtue of the trustee's position as a responsible entity.

9.292 The former trustee(s) commit an offence if they fail to comply with the requirement in the notice within 28 days of the notice being given. *[Subsection 100-70(5)]*

9.293 The maximum penalty for this offence is 50 penalty units.  
*[Subsection 100-70(5)]*

9.294 Offences included in this section of the Bill are strict liability offences as defined in section 6.1 of the *Criminal Code*.  
*[Subsection 100-70(6)]*

9.295 The offences ensure that former trustee(s) are strictly liable for their actions relating to books, identification of property and transfer of property (that is, liable regardless of fault).

9.296 This liability has been established to compel former trustee(s) which have already been removed on the grounds of misconduct to deal fairly with the trust's property during the handover period.

9.297 It is expected that the ACNC Commissioner will only take action to remove or suspend a trustee in situations that involve serious contraventions or non-compliance.



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## **Chapter 10**

# ***The Commission and the Advisory Board***

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### **Outline of chapter**

- 10.1 This Chapter:
- explains the establishment and functions of the Australian Charities and Not-for-profits Commission (ACNC);
  - explains the establishment, functions and powers of the Australian Charities and Not-for-profits Commission Commissioner (ACNC Commissioner);
  - sets out the terms and conditions of appointment of the ACNC Commissioner, and the ACNC Commissioner's powers of delegation; and
  - explains the establishment, functions and powers of the Advisory Board, including the membership of the Advisory Board.

### **Summary of new law**

10.2 The ACNC is a new Commonwealth statutory office which will be responsible for the regulation of the not-for-profit (NFP) sector.

10.3 This Chapter addresses how the ACNC is established, as well as the terms and conditions of appointment of the ACNC Commissioner, and the ACNC Commissioner's powers of delegation, in order to administer the national regulatory framework.

10.4 The ACNC will also provide assistance and support for the NFP sector through the provision of educational material and other guidance.

### **Detailed explanation of new law**

#### **The Australian Charities and Not-for-profits Commission**

10.5 This Bill establishes the ACNC. [*Section 105-5*]

10.6 The ACNC consists of:

- the ACNC Commissioner; and
- any staff assisting the ACNC Commissioner that are engaged under the *Public Service Act 1999* and are subject to the directions of the ACNC Commissioner.

*[Section 105-10]*

10.7 Staff assisting the ACNC Commissioner are provided by the Commissioner of Taxation; however, they will be officers of the ACNC and report to the ACNC Commissioner in respect of all matters for which the ACNC Commissioner is responsible.

10.8 The function of the ACNC is to assist the ACNC Commissioner in the performance of his or her functions. *[Section 105-15]*

10.9 The ACNC enjoys the same privileges and immunities as the Crown. This means that the ACNC is legally and financially part of the Commonwealth. This confers on the ACNC the non-statutory privileges and immunities of the Crown, and the benefit of the presumption that legislation does not generally apply to the Crown. *[Section 105-20]*

## **The ACNC Commissioner**

10.10 This Bill establishes the position of the ACNC Commissioner. *[Subsection 110-5(1)]*

10.11 Once the Bill is enacted, the ACNC Commissioner has the general administration of the law, and the other powers and functions that this Bill, or any other laws, confers on the office. *[Subsection 110-5(2)]*

10.12 The ACNC Commissioner has the function of assisting registered entities in complying with and understanding the Bill, by providing them with guidance and education. *[Subsection 110-10(1)]*

10.13 The ACNC Commissioner also has the function of assisting the public in understanding the work of the NFP sector, in order to support the transparency and accountability of the sector, by giving the public relevant information on the ACNC's website. This function does not limit the ACNC Commissioner's other functions. *[Subsection 110-10(2) and (3)]*

10.14 The ACNC Commissioner has the power to do all those things necessary or convenient to be done for, or in connection with, the performance of his or her functions. However, this power does not extend



to the spending of public monies without a proper delegation in place.  
*[Subsection 110-15]*

10.15 This means that the ACNC Commissioner is able to administer general activities associated with the Bill such as the running of a website and the provision of educational information to the sector, as well as other powers and functions as described in detail in the Bill.

10.16 The position of ACNC Commissioner is an independent statutory office. In the exercise of his or her functions, the ACNC Commissioner is not subject to the direction or control of any Minister or of another government department or agency.

10.17 The ACNC Commissioner may have regard to the advice and recommendations of the Advisory Board (see paragraphs 10.58 to 10.70 below) in carrying out his or her functions and exercising his or her powers, but he or she is not obligated to act in accordance with this advice. *[Subsection 110-20(1)]*

10.18 These provisions mean that the Advisory Board is not a decision-making body. While the Advisory Board can provide advice and suggestions, it is the ACNC Commissioner who is responsible for making decisions on behalf of the ACNC.

10.19 The ACNC Commissioner may attend Advisory Board meetings only upon an invitation from the Chair of the Advisory Board.  
*[Subsection 110-20(2)]*

#### ***Terms and conditions of appointment***

10.20 The Bill sets out the terms and conditions of the ACNC Commissioner's appointment.

10.21 The Governor-General is responsible for appointing the ACNC Commissioner by written instrument. *[Subsection 115-5(1)]*

10.22 The ACNC Commissioner is to be appointed on a full-time basis. *[Subsection 115-5(2)]*

10.23 The written instrument of appointment contains the period of appointment, which must not exceed 5 years. *[Section 115-10]*

10.24 The person currently occupying the office of ACNC Commissioner is eligible for re-appointment. *[Section 115-10 note]*

10.25 The Bill provides for circumstances when there needs to be an Acting ACNC Commissioner. The Bill gives the Minister the power to appoint an Acting ACNC Commissioner when there is a vacancy in the

office, or if the ACNC Commissioner is out of Australia or unable to perform the duties of the office. The rules that apply to acting appointments are set out in section 33A of the *Acts Interpretation Act 1901*. [Section 115-15]

10.26 The Remuneration Tribunal is responsible for determining the remuneration and leave entitlements of the ACNC Commissioner. The regulations may prescribe a remuneration amount that is to apply in the absence of a determination by the Remuneration Tribunal. The regulations may also prescribe any allowances due to the ACNC Commissioner. [Section 115-20]

10.27 Recreation leave entitlements of the ACNC Commissioner are determined by the Remuneration Tribunal. The Minister also has discretion to grant the ACNC Commissioner a leave of absence. The Minister may grant a leave of absence, for example, if the personal circumstances of the ACNC Commissioner require it. [Section 115-25]

10.28 The ACNC Commissioner must disclose to the Minister, in writing, all interests, pecuniary or otherwise, that the ACNC Commissioner has or acquires which may conflict with the proper performance of the ACNC Commissioner's functions. [Section 115-30]

10.29 The ACNC Commissioner is not allowed to engage in other paid employment without the Minister's approval. [Section 115-35]

10.30 The above two conditions ensure that the ACNC Commissioner is not compromised by other interests in his or her duties.

10.31 The Minister may set other terms and conditions of the ACNC Commissioner's office which are not covered by the Bill. This may include setting out additional specific leave entitlements. [Section 115-40]

10.32 The ACNC Commissioner may resign from the office by giving the Governor-General a signed notice of resignation. The ACNC Commissioner's resignation will take effect from the day the notice is received by the Governor-General, unless the notice specifies another day in the future, in which case resignation will take effect from the later day. [Section 115-45]

10.33 The Bill provides for the Governor-General to terminate the ACNC Commissioner's appointment:

- for misbehaviour or incapacity (either physical or mental) [Subsection 115-50(1)]; or
- if the ACNC Commissioner:

- becomes bankrupt;
- applies for bankruptcy;
- compounds with his or her creditors; or
- assigns his or her remuneration for the benefit of creditors *[Paragraph 115-50(2)(a)]*; or
- if the ACNC Commissioner is absent without a leave of absence *[Paragraph 115-50(2)(b)]*;
- if the ACNC Commissioner engages in paid employment without approval *[Paragraph 115-50(2)(d)]*; or
- if the ACNC Commissioner fails to comply with any terms or conditions of employment provided for by the Bill or by the Minister in accordance with the Bill *[Paragraph 115-50(2)(c)]*.

10.34 This standard provision is included to ensure that the ACNC Commissioner is able to perform his or her duties without interference, while acknowledging that there may be circumstances where it is both appropriate and warranted for the ACNC Commissioner to be replaced to ensure the proper function of the office of ACNC Commissioner.

10.35 The ACNC Commissioner's appointment may be terminated in cases where her or his personal finances have been compromised. These circumstances are included to ensure the ACNC Commissioner's ability to perform her or his duties is not compromised by his or her personal financial situation.

10.36 The ACNC Commissioner is able to delegate his or her powers or functions in accordance with this Bill. The delegation must be in writing, and must be to a person holding the position, or performing the duties, of a Senior Executive Service (SES) employee working at the ACNC. *[Subsection 115-55(1)]*

10.37 Delegates must exercise their powers in accordance with any lawful written directions provided by the ACNC Commissioner. *[Subsection 115-55(2)]*

10.38 Lower level staff of the ACNC will be involved in the day-to-day decisions of the ACNC; however, decision-making authority will rest with the delegate. This is in line with the practices of most Commonwealth authorities. Consistent with those practices, other Australian Public Service (APS) staff may act as an agent of the delegate in carrying out the ACNC Commissioner's functions.

10.39 Before signing or executing any notice, determination, instrument or other document which gives rise to a reviewable decision, officers must ensure that they have been authorised by a delegate of the ACNC Commissioner to exercise the power in question on his or her behalf, and in accordance with any instructions given to the officer acting for, and on behalf of, the delegate.

#### ***Staffing and consultants***

10.40 The Bill provides details of the staffing of the ACNC, and the ability of the ACNC to engage consultants.

10.41 The ACNC Commissioner has members of staff which are engaged under the *Public Service Act 1999*. The staff are provided by the Commissioner of Taxation, however, they are responsible to the ACNC Commissioner when performing their duties under their employment. [Section 120-5]

10.42 This ensures that staff provided to the ACNC Commissioner by the Commissioner of Taxation are accountable to the ACNC Commissioner in the performance of their duties under the ACNC Bill and act independently of the Commissioner of Taxation in making decisions about the registration and regulation of entities under this Bill. [Section 120-5 and section 120-5 (note)]

10.43 This Bill does not displace the existing common law duty of employees to comply with lawful and reasonable directions by the employer, or the existing duty of APS employees to comply with a lawful and reasonable direction under the APS Code of Conduct as set out in section 13 of the *Public Service Act 1999*.

10.44 In the rare event that a conflict should arise between a direction from the Commissioner of Taxation and the ACNC Commissioner, staff must comply with the directions of the ACNC Commissioner.

10.45 The ACNC Commissioner may engage consultants to assist in the performance of the ACNC's functions. These consultants will be engaged on behalf of the Commonwealth. [Subsection 120-10(1)]

10.46 The ACNC Commissioner is not allowed to engage a member of the Advisory Board as a consultant [Subsection 120-10(2)]. This is to ensure that Advisory Board members provide independent advice to the ACNC Commissioner to assist him or her in carrying out the functions of the ACNC. To have a member of the Advisory Board engaged as a consultant has the potential to interfere with this independence.

## Special account for the ACNC

10.47 A Special Account for the purposes of the *Financial Management and Accountability Act 1997* (FMA Act) is established by the Bill. This will be the Australian Charities and Not-for-profits Commission Special Account (Special Account). [Section 125-5]

10.48 The Special Account is an appropriation mechanism that sets aside amounts within the Consolidated Revenue Fund for expenditure for special purposes, which, in this case, relates to expenditure for the special purposes of funding the operations of the ACNC.

10.49 The Special Account sits within the Australian Taxation Office's (ATO) portfolio budget statements; however, it is accounted for as its own item, similar to how the Tax Practitioners Board is reported on in the ATO's portfolio budget statements.

10.50 A memorandum of understanding (MOU) is proposed to exist between the Commissioner of Taxation and the ACNC Commissioner. This will set out in detail how the two agencies will work together, including how the ACNC Commissioner will independently manage the ACNC budget.

10.51 However, the ACNC Commissioner must comply with the requirements of the FMA Act. [Section 110-15 note]

10.52 The FMA Act sets out the way in which officials must handle public money, public property and other resources of the Commonwealth. It also sets out general integrity rules that apply to the financial management of other Commonwealth regulators such as Australian Securities and Investment Commission (ASIC) and Australian Competition and Consumer Commission (ACCC).

10.53 The Special Account may be credited by amounts equal to the following:

- amounts received by the Commonwealth in connection with the performance of the ACNC Commissioner's functions under the Bill;
- amounts of any gifts or bequests made for the purposes of the account; and
- amounts received by the Commonwealth in relation to property paid for with amounts debited from the ACNC Special Account.

*[Section 125-10]*

10.54 The Special Account is used to pay or discharge costs, expenses and other obligations incurred by the Commonwealth in relation to the performance of the ACNC Commissioner's functions; to pay for remuneration or allowances to persons in accordance with the Bill; and to meet any expenses associated with administering the Special Account.

*[Section 125-15]*

## **Reporting**

10.55 The ACNC Commissioner must provide an annual report to the Minister as soon as practicable after the end of the financial year (1 July to 30 June) for presentation to Parliament. The report provides details on the ACNC Commissioner's operations during that year. *[Subsection 130-5(1)]*

10.56 The report must also include an evaluation of the ACNC's overall performance during the year. *[Subsection 130-5(2)]*

10.57 The provisions about annual reports in section 34C of the *Acts Interpretation Act 1901* apply in relation to the presentation of the ACNC Commissioner's annual report. For example, subsection 34C(2) provides that the ACNC Commissioner must furnish the report to the Minister within six months after the end of the financial year. This means that 'as soon as practicable' is read to mean no longer than six months.

*[note in subsection 130-5(1)]*

10.58 Subsection 34C(4) of the *Acts Interpretation Act 1901* also applies so that the ACNC Commissioner may apply to the Minister for an extension of the period if the ACNC Commissioner is of the opinion that it will not be reasonably possible to comply with the six-month time requirement.

## **The Advisory Board**

10.59 The Bill establishes an ACNC Advisory Board. *[Section 135-5]*

10.60 The Advisory Board consists of two to eight general members. Collectively, the general Advisory Board members must have expertise relating to charities and NFP entities, or experience and appropriate qualifications in relation to law, taxation or accounting. Each member may have expertise and experience in a number of these areas.

*[Paragraph 135-10(b)]*

10.61 The members are expected to have a detailed knowledge of the NFP sector and how it operates.

10.62 The Advisory Board may also consist of a number of *ex officio* members as determined by the Minister. *[Paragraph 135-10(a)]*

10.63 The Advisory Board's function is to provide advice and make recommendations to the ACNC Commissioner in relation to the ACNC Commissioner's functions under this Bill. The Advisory Board is to provide advice to the ACNC Commissioner in response to a request for such advice from the ACNC Commissioner. *[Subsection 135-15(1)]*

10.64 The Advisory Board cannot provide advice that is not in response to a request from the ACNC Commissioner.

10.65 The Advisory Board can do anything which is necessary or convenient in connection with performing its function. *[Subsection 135-15(2)]*

10.66 However, this broad power does not extend to the spending of public monies without a proper delegation in place. The Advisory Board must not spend money without a delegation from the Commissioner of Taxation. However, it is not expected that the need will arise for the Advisory Board to spend public money, and therefore, no delegations for the spending of public money are likely to be put in place. These matters are to be set out in the MOU between the Commissioner of Taxation and the ACNC Commissioner.

10.67 The ACNC Commissioner is not bound to act in accordance with any advice from the Advisory Board because the Advisory Board is not a decision-making body. *[Subsection 135-15(3)]*

10.68 The Advisory Board is a body that can provide sector-specific advice to the ACNC Commissioner, to assist the ACNC Commissioner in his or her decision-making role. The Advisory Board is not a governing body and has no operational oversight role.

10.69 The Advisory Board has no decision-making power. It is intended to be a resource for the ACNC Commissioner as it can provide the ACNC Commissioner with a pool of broad knowledge and experience in the NFP sector, law, accounting and taxation which the ACNC Commissioner can draw on to assist him or her to effectively fulfil the role of ACNC Commissioner.

10.70 For example, the ACNC Commissioner may request the Advisory Board to consider the implications of certain decisions on the sector, what the next piece of guidance material that the ACNC Commissioner releases should be or what sort of education and support for the sector is necessary to assist the sector in response to emerging issues.

10.71 Commonwealth regulators are normally structured in this way so that mechanisms to ensure accountability are in place.

### ***Appointment***

10.72 The Minister may appoint a general member of the Advisory Board by written instrument. *[Subsection 140-5(1)]*

10.73 The term of appointment for general members is as specified in the written instrument, however the period must not exceed 3 years. *[Section 140-10]*

10.74 Members of the Advisory Board are eligible for reappointment. *[Note in section 140-10]*

10.75 A member of the Advisory Board is appointed on a part-time basis, and must be an ordinary resident in Australia. *[Subsections 140-5(1) and 140-5(2)]*

10.76 One of the members of the Advisory Board is to be appointed by the Minister as the Chair of the Advisory Board. Another member is to be appointed as the Deputy Chair. *[Subsection 140-5(3)]*

10.77 A person's appointment as a general member, the Chair or the Deputy Chair is not invalid merely because of a defect or irregularity in connection with the person's appointment. This protects the ACNC in the event that they would receive advice from a possibly, and only technically, mis-constituted board. *[Subsection 140-5(4)]*

10.78 A defect or irregularity could include such things as an incorrect date, a signature in the wrong place or incorrectly numbered pages.

10.79 A general member of the Advisory Board is not an 'officer' for the purposes of Appendix E of the *Legal Services Directions*. This means that the Commonwealth will not be liable to pay the costs if a member of the Advisory Board is sued in their capacity as Advisory Board member.

### ***Remuneration***

10.80 The remuneration of the general members of the Advisory Board is determined by the Remuneration Tribunal. If no remuneration determination is in place, general members are paid in accordance with the remuneration amounts set out in the regulations. *[Subsection 140-15(1)]*

10.81 The regulations may prescribe any allowances payable to the general members *[subsection 140-15(2)]*. Any regulations have effect subject to the *Remuneration Tribunal Act 1973* *[subsection 140-15(3)]*.



### ***Disclosure by members***

10.82 Members of the Advisory Board must provide the Minister with written notice of all interests, pecuniary or otherwise, that the member has or acquires which may conflict with the proper performance of their functions as Advisory Board members. *[Subsection 140-20(2)]*

10.83 A member must disclose these interests to the Minister as soon as practicable after becoming aware of a possible conflict of interest. *[Subsection 140-20(2)]*

### ***Other terms and conditions***

10.84 The Minister may determine, in writing, other terms and conditions to limit the operations of the Advisory Board and its members. *[Subsection 140-25]*

### ***Resignation and termination***

10.85 General members of the Advisory Board may resign from their position on the Board by giving the Minister a signed notice of resignation. *[Subsection 140-30(1)]*

10.86 The Chair and the Deputy Chair are able to resign from those positions while remaining a general member on the Advisory Board. *[Subsections 140-30(2) and 140-30(3)]*

10.87 A resignation takes effect on the day it is received by the Minister, unless the notice specifies a day in the future, in which case resignation takes effect on the later day. *[Subsection 140-30(4)]*

10.88 The Minister has the power to terminate a member's appointment at any time. *[Section 140-35]*

### ***Meetings of the Advisory Board***

#### ***Holding meetings***

10.89 The Chair of the Advisory Board has additional responsibilities in relation to the convening of meetings.

10.90 The Chair must convene at least four Advisory Board meetings in each financial year but can call additional meetings if these are necessary for the efficient performance of the Advisory Board's function. *[Subsection 145-5(1)]*

10.91 For example, the Chair may convene an additional meeting to respond to a request for advice from the ACNC Commissioner.

*Procedure of meetings*

10.92 The Advisory Board can determine for itself how it operates. However, it must comply with any written matters determined by the ACNC Commissioner in relation to the operation of the Advisory Board. *[Subsection 145-5(2) and (3)]*

10.93 A determination made by the ACNC Commissioner in this regard is not a legislative instrument. *[Subsection 145-5(9)]*

10.94 The Chair must ensure that minutes of the Advisory Board meetings are kept. *[Subsection 145-5(4)]*

*Disclosure of interest by a member*

10.95 If a matter arises during a meeting to which a member of the Advisory Board has a direct or indirect financial interest, being an interest that could conflict with the proper performance of the Advisory Board's function, then the member must disclose that interest to the other Advisory Board members as soon as possible. *[Subsection 145-5(5)]*

10.96 This duty relates specifically to meetings, and does not override the duty which requires members to give notice to the Minister of all interests, pecuniary or otherwise, that could conflict with the proper performance of the Advisory Board's function (see paragraphs 10.82 to 10.83 above).

*Disclosure to be recorded in the minutes of the meeting*

10.97 An interest that arises during a meeting, and the subsequent decision made by the Advisory Board, must be recorded in the minutes of the meeting. *[Subsection 145-5(6)]*

10.98 The member with the interest must exclude themselves from the discussion and any subsequent advice provided by the Advisory Board, unless given permission by the Chair to participate. *[Subsection 145-5(7)]*

10.99 If the member with the interest happens to be the Chair of the Advisory Board, then the ACNC Commissioner must give permission for the Chair to participate in the discussion and any subsequent decisions relating to that member's interest. *[Subsection 145-5(7)]*

*Attendance by ACNC Commissioner*

10.100 The Chair of the Advisory Board may invite the ACNC Commissioner to attend all or any part of an Advisory Board meeting. *[Subsection 145-5(8)]*

10.101 The ACNC Commissioner must not attend an Advisory Board meeting without such an invitation.



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# Chapter 11

## Secrecy framework

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### Outline of chapter

11.1 This Chapter explains the secrecy framework of the Australian Charities and Not-for-profits Commission (ACNC), including:

- the overview and objectives of the secrecy framework;
- the general prohibition that applies to the use and disclosure of protected information;
- the exceptions that apply to the general prohibition to allow for use and disclosure in certain specified circumstances; and
- penalties for unauthorised disclosures of protected information.

### Summary of new law

#### Overview of the secrecy framework

##### *Objectives of the secrecy framework*

11.2 Under the Bill, the secrecy framework is intended to balance the need to protect personal and confidential information that entities provide to the ACNC with the need to enable disclosure of that information where it is necessary to disclose that information in accordance with the objects of this Bill. [Section 150-5]

11.3 Engagement with and the trust of the not-for-profit (NFP) sector could be at risk if responsible entities and registered entities do not have confidence that their information is being handled appropriately, which would, in turn obstruct the ACNC in undertaking its powers and functions under the Bill. [Paragraph 150-5(a)]

11.4 However, as the NFP sector receives substantial assistance through taxpayer funded concessions and public donations, the information provided to the ACNC needs to be disclosed to the public in certain circumstances in order to promote transparency and accountability

of the sector and ensure public confidence that taxpayer resources and public donations are being used appropriately. [Paragraph 150-5(b)]

### ***Structure of the secrecy framework***

11.5 Under the Bill, the secrecy framework has been designed so that where certain entities have access to personal or confidential information, obtained by the ACNC in accordance with the Bill, they are subject to a general prohibition on the use and disclosure of that information.

11.6 However, to ensure the ACNC is able to fulfil its powers and functions under the Bill, including promoting good governance, transparency and accountability, and acting as a ‘one-stop shop’ regulator for the NFP sector, disclosure of the protected information is permitted in specified circumstances detailed within the Bill.

11.7 By structuring the secrecy framework in this manner, it ensures that it is fundamentally clear to those entities handling protected information that the disclosure of that information is prohibited in all circumstances except where it is clearly set out in the Bill that it may be disclosed and for what purpose.

### **Interaction with other privacy and secrecy regimes**

11.8 Whilst the secrecy framework in the Bill provides for an overarching protection of information provided to the ACNC, that information may also be protected under other related privacy or secrecy regimes.

11.9 For example, information that is provided to the Commissioner of Taxation under a taxation law is protected under the tax secrecy framework within Division 355 in Schedule 1 to the *Tax Administration Act 1953*.

11.10 Similarly, the Office of the Australian Information Commissioner also protects information that is personal and relates to an individual under the *Privacy Act 1988* (Privacy Act). In particular, the Information Privacy Principles under the Privacy Act apply to the ACNC and set out the standards for the handling and protecting an individual’s personal information.

11.11 Of note, Information Privacy Principle 11 operates to limit the disclosure of personal information by a Government agency, except to the extent that disclosure is required or authorised by or under law. Consequently, in the specified circumstances set out in the Bill where disclosure of protected information is authorised, the secrecy framework

is consistent with the requirements under Information Privacy Principle 11 and the Privacy Act.

11.12 There is also other Commonwealth legislation that overrides the secrecy framework in the Bill and authorises disclosures in limited circumstances. These laws either permit particular entities such as the Auditor-General or Commonwealth Ombudsman to access protected information or provide immunity for ACNC officers and other entities who are compelled to disclose information that is protected under the Bill for circumstances specified in the following provisions (this list is not exhaustive):

- sections 32 and 33 of the *Auditor-General Act 1997*;
- section 9 of the *Ombudsman Act 1976*;
- section 44 of the Privacy Act;
- section 12 of the *Parliamentary Privileges Act 1987*; and
- schedule 6 to the *Anti-Terrorism Act (No. 2) 2005*.

### **Evidential burden**

11.13 Under this Bill, there are certain exceptions that apply to the general prohibition on the use, disclosure and on-disclosure of information protected under the secrecy framework.

11.14 Where an entity seeks to rely on these exceptions, the entity will bear the evidential burden to prove that they used the information or disclosed/on-disclosed the information in accordance with that exception.

11.15 Under subsection 13.3(3) of the *Criminal Code*, ‘evidential burden’ means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

11.16 In the context of the ACNC secrecy framework, this would mean that an entity seeking to rely on one of the exceptions will need to point to evidence, by way of a document or email, that suggests a reasonable possibility that they were entitled to use the information or disclose/on-disclose the information under the Bill.

11.17 It is common amongst Commonwealth secrecy regimes to place the evidential burden on the defendant where the defendant seeks to rely on an exception or defence to the general prohibition on disclosure of information (an offence-specific defence).

11.18 This is consistent with the Attorney-General's Department's publication entitled *A guide to framing Commonwealth offences, infringement notices and enforcement powers* where it states that an evidential burden of proof should generally apply to a defence where there is an offence-specific defence. In these situations, the defendant is in the best position to provide evidence justifying why they undertook the act that triggered the offence-specific defence.

11.19 Therefore, where an entity does disclose or use information they will be aware of the general prohibition and will be seeking to use the offence-specific defence that the disclosure was an authorised disclosure. In that case, placing the evidential burden on the entity is justified as they will be able to point to the authorised disclosure provision they relied upon and provide emails or written directions which support the use of the authorised disclosure.

11.20 Despite the evidential burden resting on the entity, the prosecution retains the 'legal burden' of proof and is required to prove each element of an offence beyond reasonable doubt, consistent with the requirements of Article 14 of the *International Covenant on Civil and Political Rights*.

## **Detailed explanation of new law**

### **Scope of the secrecy framework**

#### ***Information protected under the secrecy framework***

11.21 Under the Bill, the information that is protected under the secrecy framework is ***protected ACNC information***.

11.22 This is defined in the Bill to include all information that was disclosed to, or obtained by an ACNC officer for the purposes of the Bill where the information relates to the affairs of an entity other than the ACNC officer and where the information identifies, or is reasonably capable of being used to identify an entity. [*Section 150-15*]

11.23 For example, protected ACNC information includes information that is not currently in the public domain and may have been provided to the ACNC on a registration or compliance document such as an application form for registration or under a duty to notify as explained in Chapter 7 — Duty to notify.

11.24 Personal information that is provided to the ACNC related to responsible entities, management, and employees of a registered entity is



also protected ACNC information and as it pertains to an individual is also subject to the Information Privacy Principles under the Privacy Act.

11.25 Information that is either in the public domain or in no way identifies an entity, or is reasonably capable of being used to identify an entity, is not considered protected ACNC information.

11.26 Information that has been made public through the ACNC Register under Division 40 is not considered protected ACNC information after it has been displayed on the ACNC website.

***Entities subject to the secrecy framework***

11.27 Under the Bill, Part 7-1 applies to ACNC officers (as defined under section 900-5) but it also extends to other entities and refers to them within Part 7-1 as if they were ACNC officers. *[Section 150-10]*

11.28 These non-ACNC officer entities that are within scope of the secrecy framework include:

- an entity engaged to provide services relating to the ACNC *[paragraph 150-10(a)]*;
- an individual employed by an entity referred to in the dot point above *[paragraph 150-10(b)]*;
- an individual appointed or employed by, or performing services for, the Commonwealth or an authority of the Commonwealth that is performing functions or exercising powers under or for the purposes of the Bill *[paragraph 150-10(c)]*; or
- a member of the Advisory Board *[paragraph 150 10(d)]*.

**Example 11.1**

Todd is an IT contractor who has recently been contracted by the ACNC to develop an internet based product. Todd is a non-ACNC officer entity that is subject to the secrecy framework under the Bill.

**Example 11.2**

Johan is an IT sub-contractor and works for Todd (as per Example 11.1) and is supporting him in testing his internet based product. As he is an individual employed by Todd to provide services relating to the Commission, he is also a non-ACNC officer entity that is subject to the secrecy framework under the Bill.

Example 11.3

Gerald works for the Department of Families, Housing, Community Services and Indigenous Affairs. However, as part of a secondment program he is working for the ACNC and performing audits on charities. Gerald is a non-ACNC officer entity that is subject to the secrecy framework under this Bill.

Example 11.4

Ashley is a member of the Advisory Board and appointed under Division 140 of this Bill. Ashley provides advice and makes recommendations to the ACNC Commissioner in relation to the ACNC Commissioner's functions under the Bill and is therefore a non-ACNC officer entity that is subject to the secrecy framework under the Bill.

11.29 In addition to the non-ACNC officers that are covered by section 150-10, the secrecy framework also applies, to some extent, to entities that acquire protected ACNC information in accordance with an authorised disclosure detailed in the Bill.

11.30 In that situation, they are subject to a prohibition on on-disclosure of that information except where allowed under Subdivision 150-D. This is discussed further at paragraph 11.64 of this Chapter.

Example 11.5

Eliz works for the ATO and in the performance of her duties acquired protected ACNC information through an authorised disclosure under section 150-40 for the purpose of administering the tax law.

Whilst Eliz is not an ACNC officer or an entity covered by section 150-10, she is still subject to the secrecy framework as she is prohibited from disclosing or using the protected ACNC information pursuant to Subdivision 150-D.

### **General prohibition on use or disclosure of protected ACNC information**

11.31 The secrecy framework in the Bill prohibits the use or disclosure of protected ACNC information by an entity (as described at paragraph 11.27 of this Chapter). *[Section 150-25]*

11.32 The unauthorised use or disclosure of protected ACNC information by an entity is an offence and a court can impose upon an individual a penalty of imprisonment of up to two years or 120 penalty units or both. *[Subsection 150-25(1)]*

11.33 The *Crimes Act 1914* prescribes rules for converting penalties for natural persons into a penalty that applies to a body corporate.

***Meaning of ‘use’ and ‘disclosure’***

11.34 Under this Chapter, the terms ‘use’ and ‘disclosure’ are intended to take their ordinary meaning.

11.35 The term ‘use’ includes situations where an ACNC officer has access to the protected ACNC information and records the information, takes the information or recalls the information and takes advantage of the information or exploits it for some kind of outcome.

**Example 11.6**

Harry has access to protected ACNC information, he writes down sensitive financial information about a charity from a file and puts it to use by changing his share portfolio to account for the information he has used.

By exploiting the information for a personal benefit and altering his share portfolio, Harry has ‘used’ the protected ACNC information in contravention of the general prohibition under this Bill.

11.36 The term ‘disclosure’ includes situations where an ACNC officer has access to the protected ACNC information and then divulges or releases that information to another entity.

11.37 Information may be disclosed by publishing, writing, speaking, transmitting or conveying it in any form that enables the other entity to identify the entity to which the information relates.

**Example 11.7**

Finn has access to protected ACNC information; he then publishes the information on his blog which is publicly available on the internet.

By publishing the information on the internet, which can be viewed by the public, Finn has disclosed the protected ACNC information in contravention of the general prohibition under this Bill.

**Exceptions to the general prohibition on use or disclosure of protected ACNC information**

11.38 The general prohibition operates to make it an offence to use or disclose the information, however, in order to give effect to the balance between protection of information and disclosure for the objects of the

Bill, the secrecy framework permits use or disclosure of information in certain circumstances. *[Subparagraph 150-25(1)(c)(i) and subsection 150-25(3)]*

11.39 These exceptions to the general prohibition which give rise to authorised use or disclosures include:

- disclosure to the entity to whom the information relates *[subparagraph 150-25 (1)(c)(i) and subsection 150-25(2)]*;
- disclosure or use in the performance of duties under the Bill *[section 150-30]*;
- disclosure on the Australian Charities and Not-for-profits Commission Register (ACN Register) to achieve the objects of the Bill *[section 150-35]*;
- disclosure to an Australian government agency *[section 150-40]*;
- disclosure or use with consent of the entity *[section 150-45]*;
- and
- disclosure of information lawfully made available to the public *[section 150-50]*.

***Disclosure to the entity to whom the information relates***

11.40 An entity covered by the general prohibition may disclose the protected ACNC information, where that information is disclosed to a set of entities to which the information relates, or are closely linked to the entity to whom the information relates. These entities include:

- the entity to whom the information relates *[paragraph 150-25(2)(a)]*;
- a relevant agent of the entity to whom the information relates *[paragraph 150-25(2)(b)]*; or
- a responsible entity of a registered entity to whom the information relates *[paragraph 150-25(2)(c)]*.

**Example 11.8**

Help the Children Ltd is a charity and is a registered entity under the ACNC. The company requests the ACNC to provide it with certain financial information it provided in the previous year. The financial information is protected ACNC information under the Bill.

However, as the entity that provided the protected ACNC information is the entity requesting that information, the ACNC officer responsible may disclose that information to the company.

#### Example 11.9

Boris is a registered tax agent and is the tax agent for the recently established Citytown Public Hospital. He needs information on the endorsement process and requests this information from the ACNC for the purpose of filling out tax returns and interacting with the Commissioner of Taxation.

Because Boris is an agent of the public hospital, to whom the protected ACNC information relates, and Boris is the relevant agent for that information, the ACNC officer may disclose that information to Boris.

#### Example 11.10

Philip is the responsible entity of the 'Fix Poverty' charity which is a registered entity under the ACNC. He needs some information from the ACNC which the charity provided in previous years.

The information provided is protected ACNC information, but because Philip is the responsible entity of the registered entity, the ACNC officer responsible may disclose that information to Philip.

#### ***Disclosure or use in the performance of duties under the Bill***

11.41 An ACNC officer may use or disclose protected ACNC information where the use or disclosure is in the ordinary course of performing their duties under the Bill.

11.42 This exception covers the performance of duties that are necessary for the administration of any powers or functions granted to an ACNC officer under the Bill.

11.43 This exception also allows ACNC officers to disclose information amongst each other within the ACNC or use information in order to perform the powers or functions detailed within the Bill.

#### Example 11.11

Cherry is an ACNC officer who is responsible for processing registration forms for charities applying to be registered entities under this Bill. In order to process a particular application Cherry needs to talk to Pours in the compliance area about the charity involved.

Because Cherry is performing her duties under the Bill by processing registration applications she is able to use the protected ACNC information and is able to disclose that information to Pours who is also performing his duties under the Bill.

#### Example 11.12

Edmund is an ACNC officer in the compliance area of the ACNC and is responsible for auditing registered entities. Edmund has been assigned five cases, however, he sees that his colleague has been assigned a case involving a famous celebrity.

Edmund decides to have a look through his colleagues 'celebrity' file and then at lunch speaks to another ACNC colleague, Tony, about the case details.

Even though both Edmund and Tony are ACNC officers, and even though Edmund is involved in compliance, the disclosure of the 'celebrity' file to Tony was not in the ordinary course of Edmund's duties as he was not assigned to the file and accessed the material outside of his normal duties. In this situation, Edmund would have committed an offence under section 150-25 of the Bill.

11.44 This exception also allows for use and disclosure of protected ACNC information by an ACNC officer for the purpose of proceedings related to the Bill. This means that under this exception ACNC officers would be able to use information or disclose the information to courts, external legal advisers, the Commonwealth Director of Public Prosecutions or the Administrative Appeals Tribunal (AAT) for the purpose of proceedings that are related to the Bill.

#### Example 11.13

A registered entity has its registration revoked by the ACNC Commissioner under this Bill. The entity goes through the objection process but at the end wishes to challenge the ACNC Commissioner's objection decision and have it reviewed by the AAT.

Under this exception, the relevant ACNC officer can disclose the relevant protected ACNC information to the AAT for the purpose of having the decision reviewed in accordance with the review and appeals framework under the Bill.

11.45 Despite the operation of this exception, an ACNC officer cannot be compelled to disclose protected ACNC information to a court or tribunal or to produce to a court or tribunal documents containing protected ACNC information except where it is necessary to do so for the purposes of giving effect to this Act. [Section 150-20]

11.46 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.

***Disclosure on the ACN Register to achieve the objects of the Bill***

11.47 Under this exception, an ACNC officer may disclose protected ACNC information to the public through the ACN Register in accordance with Division 40 of this Bill. *[Paragraph 150-35(a)]*

11.48 The disclosure is authorised under this exception only where it is required under section 40-5(1) of the Bill and is for the purpose of including on the ACN Register. *[Paragraph 150-35(b)]*

11.49 Once the protected ACNC information has been disclosed on the Register under this exception, the information will be considered in the public domain and further disclosure of that information, or on-disclosure of that information will be permitted by other exceptions in sections 150-50 and 150-65 of the Bill which are discussed below.

11.50 Where the information to be disclosed under this exception is personal information (as defined under the Privacy Act), then the ACNC officer making the disclosure must consider whether the disclosure is necessary to achieve the objects of the Bill. *[Paragraph 150-35(c)]*

11.51 This provides an additional safeguard against arbitrary interference with privacy and will ensure that personal information is only disclosed where it is required and justified.

***Disclosure to an Australian government agency***

11.52 A disclosure of protected ACNC information is authorised under this exception where it is made to an Australian government agency for the purpose of enabling them to fulfil their powers and functions and where it is reasonably necessary to promote the objects of the Bill. *[Section 150-40]*

11.53 The intention of this exception is to enable the ACNC to fulfil its role under the Bill as a ‘one-stop shop’ regulator for the NFP sector by sharing relevant information with other government departments and agencies.

11.54 For registered charities under this Bill this will then produce cost efficiencies as the required information is provided and collected on a

single occasion, instead of on multiple occasions and interaction with government departments and agencies can be more efficient and timely.

**Example 11.14**

The ACNC may provide a ‘seamless’ application process for entities applying to be a registered entity and applying for an Australian Business Number (ABN) at the same time.

This interaction with the Australian Business Registrar will be authorised under this exception and will ensure that ‘behind the scenes’ there is a process for disclosure or relevant information for efficient registration of the ABN and the registered entity.

11.55 When considering whether disclosure is authorised under this provision, the ACNC officer concerned must be satisfied that the disclosure is necessary for the purposes of enabling or assisting the government department or agency to perform or exercise a particularly function or power of the agency which is reasonably necessary to promote the objects of the Bill. *[Paragraphs 150-40(b) and 150-40(c)]*

11.56 This consideration ensures that only information that is required by the government department or agency to meet the objects of this Bill will be disclosed. This provides an additional safeguard against arbitrary interference with privacy and ensures that protected ACNC information is handled appropriately.

*Meaning of an Australian government agency under this exception*

11.57 The disclosure to an Australian government agency under this provision references the definition of ‘Australian government agency’ under the Bill and will cover Commonwealth, State and Territory governments as well as an authority of the Commonwealth, State and Territory. *[Paragraph 150-40(a) and section 900-5]*

11.58 The Commonwealth, State and Territory authorities that are expected to have information disclosed under these provisions will be those that administer laws using registration as a pre-condition to entitlements and those that administer laws that protect and enhance the trust and confidence in NFP entities.

***Disclosure or use with consent***

11.59 Where a responsible entity or registered entity provides their consent to an ACNC officer in writing, then disclosure of the protected ACNC information relating to that responsible entity or registered entity is authorised to the extent that it is consistent with the purpose for which the consent was given by the relevant entity. *[Section 150-45]*



### Example 11.15

Freddy is a responsible entity for the 'HumaNature' charity which is a registered entity under this Bill. Freddy fills out a consent form and signs it on behalf of HumaNature to allow the ACNC to disclose protected ACNC information, in respect to HumaNature, to the Commonwealth Department of Human Services for a grant application.

Based on the consent of the responsible entity, the ACNC officer concerned may disclose the protected ACNC information relating to HumaNature to Department of Human Services for the purpose of the grant application.

### ***Disclosure of information lawfully made available to the public***

11.60 Where information is in the public domain it is accessible by everyone and therefore does not retain its confidential nature.

11.61 Therefore under this exception, where protected ACNC information has lawfully been made available to the public, an ACNC officer may disclose that information. *[Section 150-50]*

11.62 Information that has been made available to the public means publicly available information that would include the internet, newspapers, open court records, the electoral role and would also include information that the public may access by way of a fee structure.

11.63 However, despite the application of this exception, the general prohibition on use and disclosure of protected ACNC information applies so that an ACNC officer may not use non-public information to supplement or qualify the information that has been lawfully made available to the public.

### **General prohibition on the on-disclosure of protected ACNC information**

11.64 Subdivision 150-D provides that where an entity acquires protected ACNC information under an authorised disclosure provision in the Bill there is a general prohibition on the on-disclosure of that information to another entity or use of that information. *[Subsection 150-55(1)]*

11.65 The general prohibition on the use of protected ACNC information by entities that have acquired the information from an ACNC officer under the Bill is in place to ensure that those entities that acquire the information must use the information in a manner that is consistent with the original purpose for the disclosure. This is explained further below at paragraph 11.72 of this Chapter.

11.66 The general prohibition on the on-disclosure of protected ACNC information operates to restrict the flow of protected information from entities that have acquired the information from an ACNC officer under the Bill. This prohibition applies to an entity where:

- the entity concerned is not an ACNC officer as determined under this Part [*paragraph 150-55(1)(b)*]; and
- the entity concerned acquired protected ACNC information and acquired it under an exception to this Bill [*paragraphs 150-55(1)(a) and 150-55(1)(c)*].

#### Example 11.16

Bruce works for the ATO and in the course of performing his duties as a taxation officer acquired protected ACNC information about the 'Healthy Touch' charity under section 150-40 of the Bill for the purpose of administering a taxation law.

During lunch he discloses to his friend details of the charity and sensitive information about financial matters. Under this provision Bruce has contravened the general prohibition on on-disclosure and has committed an offence.

11.67 Where an entity contravenes this provision by on-disclosing or using the protected ACNC information, it constitutes a criminal offence. The maximum penalty for this offence is 2 years imprisonment or 120 penalty units or both. [*Subsection 150-55(1)*]

11.68 For the purposes of Part 7-1, 'on-disclosure' and 'use' has the same meaning as 'disclosure' and 'use' as discussed at paragraph 11.34 of this Chapter.

### **Exceptions to the general prohibition on the on-disclosure of protected ACNC information**

11.69 As with the general prohibition on use or disclosure for ACNC officers, on-disclosure and use of the protected ACNC information acquired by an entity will be authorised where the on-disclosure or use falls under an exception in the Bill. [*Subparagraph 150-55(1)(d)(i) and subsection 150-55(3)*]

11.70 These exceptions to the general prohibition on the use and on-disclosure of protected ACNC information acquired by entity which give rise to an 'authorised on-disclosure' include:

- on-disclosure to the entity to whom the information relates [*Subparagraph 15-55(1)(d)(i) and subsection 150-55(2)*];

- on-disclosure or use of information for the original purpose or in connection with the original purpose that it was disclosed [Section 150-60]; and
- on-disclosure of information that has lawfully been made available to the public [Section 150-65].

***On-disclosure to the entity to whom the information relates***

11.71 This exception is identical to the exception that applies to disclosure or use of information by ACNC officers in subparagraph 150-25(1)(c)(i). The intention being that an entity covered by the general prohibition on on-disclosure of information may disclose the protected ACNC information, where that information is disclosed to a set of entities to whom the information relates, or are closely linked to the entity to whom the information relates. These entities include:

- the entity to whom the information relates [paragraph 150-55(2)(a)];
- A relevant agent of the entity to whom the information relates [paragraph 150-55(2)(b)]; or
- a responsible entity of a registered entity to whom the information relates [paragraph 150-55(2)(c)].

***On-disclosure or use of information for the original purpose or in connection with the original purpose that it was disclosed***

11.72 This exception allows entities that acquire protected ACNC information for a purpose specified in an exception in Subdivision 150-C to use the information or on-disclose the information where the use or on-disclosure is for the original purpose, or in connection with the original purpose for which the information was provided to the entity. [Subsection 150-60(1)]

11.73 Under this exception, the ‘original purpose’ means the purpose for which the protected ACNC information was initially disclosed by an ACNC officer under an exception in Subdivision 150-C.

**Example 11.17**

Linda, an ACNC officer, discloses protected ACNC information to Ian, an official from the Department of Health and Ageing under section 150-40 for the purpose of undertaking a funding program related to aged care services run by the Department.

Ian can only use that information for the purpose of undertaking the funding program run by the Department.

Example 11.18

Patrick, an ACNC officer, discloses protected ACNC information to Lauren, an official from ASIC under section 150-40 for the purpose of enforcing a law that ASIC administers that may result in a criminal offence.

Lauren can on-disclose that information within ASIC to other sections that directly facilitate building the case as the on-disclosure would be for the purpose of enforcing a law that ASIC administers that may result in a criminal offence.

11.74 Under this exception, ‘in connection with the original purpose’ means that the use or on-disclosure is incidental to, or arises as a consequence of, any action taken in pursuance of the original purpose.

Example 11.19

As per Example 11.17, where Ian is undertaking the funding program he is asked to quantify the costs associated with the program and provide a brief to the Department of Finance and Deregulation about whether the spending has been worthwhile. Ian uses some of the information provided by the ACNC to develop the brief for the Department of Finance.

In that situation, whilst the use of the information for the brief is not directly for the original purpose of undertaking the funding program, it is in connection with the original purpose as the use is a consequence of undertaking the funding program and facilitates undertaking the funding program by meeting evaluation requirements for further funding.

11.75 Under the Bill, it is made it clear that, without limiting the meaning of ‘in connection with the original purpose’, it is intended that use or on-disclosure will be considered ‘in connection with the original purpose’ where the use is by or disclosure is to any entity, court or tribunal and it is for the purpose of criminal, civil or administrative proceedings (including merits review or judicial review) related to the original purpose. [*Subsection 150-60(2)*]

Example 11.20

As per Example 11.18, where Lauren and her ASIC colleagues have built a case for a potential contravention of a law that ASIC administers which may result in a criminal offence, Lauren will be able to on-disclose the information to the Commonwealth Director of Public Prosecution (CDPP) to enable them to prosecute the offence.

Whilst the original disclosure was for the purpose of ASIC enforcing the law, allowing CDPP to prosecute the offence is in connection with the original purpose and would therefore be covered by the exception.

***On-disclosure of information that has lawfully been made available to the public***

11.76 This exception is identical to the exception that applies to disclosure of information by ACNC officers in section 150-50.

11.77 The intention being that where protected ACNC information has lawfully been made available to the public, an entity that acquired the protected ACNC information may on-disclose that information.

*[Section 150-65]*



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## **Chapter 12**

### **Reviews and appeals**

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#### **Outline of chapter**

- 12.1 This Chapter explains:
- the review and appeal framework under this Bill;
  - what decisions can be reviewed and how they are reviewed and appealed; and
  - the process for appealing a decision to the Administrative Appeals Tribunal (AAT) or court.

#### **Summary of new law**

##### **Overview of the review and appeal framework**

12.2 The review and appeal framework of the Bill sets out the processes for an entity to challenge certain decisions of the Australian Charities and Not-for-profits Commission Commissioner (ACNC Commissioner), if they are dissatisfied with the ACNC Commissioner's decision.

12.3 These processes are consistent with the review and appeal rights under other Commonwealth legislation and allow objections related to reviewable decisions to be properly reviewed by the ACNC, or to be independently reviewed by the AAT or the courts. [*Subsection 155-5(1)*]

12.4 The structure of the review and appeal framework in this Bill is modelled closely on the existing review and appeal framework in Part IVC of the *Taxation Administration Act 1953* (TAA 1953). This ensures 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.

12.5 Consistency between the review and appeal framework in this Bill and in the taxation law also allows for decisions of the ACNC

Commissioner and the Commissioner of Taxation to be heard together. This reduces compliance costs for charities that are dissatisfied by a decision and wish to object to both decisions. This is further discussed at paragraph 12.97 of this Chapter.

## Detailed explanation of new law

### Who can have a decision reviewed?

12.6 Only an entity that is directly affected by the decision can utilise review and appeal rights in respect to the decision of the ACNC Commissioner.

12.7 This ensures that parties are fully informed of the circumstances surrounding the ACNC Commissioner's decisions, and limits the right to lodge objections to those that have a direct stake in the ACNC Commissioner's decision.

12.8 An entity for the purposes of this framework will commonly include an entity that is registered under this Bill, a responsible entity of that registered entity, or an entity that is in the process of applying for registration under this Bill.

### What decisions can be reviewed?

12.9 The types of decisions that are reviewable are referenced at various points throughout the Bill as being reviewable under Part 7-2. For the purposes of Part 7-2 these decisions are referred to as an 'administrative decision'. [*Subsection 155-5(2)*]

12.10 An **administrative decision** commonly includes decisions made by the ACNC Commissioner which affect a particular entity that may be applying for registration under this Bill or relate to the registration or regulation of that particular entity.

12.11 Within this Bill, the following decisions are 'administrative decisions':

- refusal of application for registration [*Subsection 30-15(4)*];
- refusal of registration [*Section 30-35*];
- revocation of registration [*Section 35-20*];
- decision to give a direction [*Paragraph 85-25(a)*];



- decision to vary a direction [*Paragraph 85-25(b)*];
- decision not to vary or revoke a decisions after 12 months [*Paragraph 85-25(c)*];
- decision to suspend the responsible entity [*Paragraph 100-10(10)(a)*];
- decision to change the time a suspension of the responsible entity ends [*Paragraph 100-10(10)(b)*]
- decision to remove a responsible entity [*Subsection 100-15(7)*]; and
- decision to remit all or a part of an administrative penalty [*Subsection 175-60(3)*].

12.12 Where there are multiple administrative decisions that affect the entity and the entity wishes to challenge an administrative decision under Part 7-2 of the Bill, the set of administrative decisions are deemed to be the one decision. [*Section 155-10*]

12.13 This allows the ACNC Commissioner to consider circumstances in full and to explicitly consider the implications of changing one decision on other related decisions.

12.14 Entities may also be able to have related decisions of another Commonwealth Government agency or department considered jointly with a review of the ACNC Commissioner's decision by the AAT or courts where certain conditions are met. This is further discussed at paragraph 12.97 of this Chapter.

### **How is a decision reviewed?**

12.15 The review and appeal framework of this Bill provides entities with a number of avenues to have decisions made by the ACNC Commissioner reviewed. These include:

- making an objection to an administrative decision;
- reviewing an objection decision or an extension-of-time-refusal decision by the AAT;
- reviewing an objection decision by the courts; or
- making a combined application for AAT review or appeal to the court.

## **Making an objection to an administrative decision**

12.16 An entity that is dissatisfied by an administrative decision under this Bill can have that decision reviewed by making an objection to the ACNC Commissioner. *[Subsection 155-5(1)]*

12.17 So that the objection can be fully considered, it must be lodged in the form specified by the ACNC Commissioner, within a specified period and must state in detail the ground on which the entity is objecting to the decision. *[Section 160-5]*

12.18 When determining the approved form for lodging objections, the ACNC Commissioner can specify the information required in order to develop a view and respond to lodged objections.

### ***Timeframe for lodging an objection***

12.19 The ***review period*** means the period of time in which the objection must be lodged and is 60 days after the administrative decision has been served on the entity. This time period provides adequate time for registered entities and responsible entities to consider administrative decisions and develop a case for objection. *[Subsection 160-10(1)]*

12.20 The review period is also consistent with the timeframe provided under other Commonwealth review and appeal provisions such as section 14ZW of the TAA 1953 which applies to taxpayers wishing to make a taxation objection.

12.21 Where the entity is unable to meet the review period, the entity may apply to the ACNC Commissioner for late lodgement of the objection by lodging the objection along with a written request to the ACNC Commissioner to have the objection considered despite the late lodgement. *[Subsection 160-10(2)]*

12.22 The written request must include information about why the entity was unable to meet the 60 day time period and give reasons for why the ACNC Commissioner should consider the late lodgement of the objection. *[Subsection 160-10(3)]*

12.23 The ACNC Commissioner may only accept late lodgement of objections in special circumstances including, but not limited to, situations where:

- there were unforeseeable and uncontrollable events; or
- further time is required to ensure all the relevant facts are considered in coming to a view on the objection.

### Example 12.1

Jerry is a responsible entity for a registered entity and wishes to object to a decision under this Bill. However, before the end of the review period, Jerry could not lodge the objection with the ACNC because of an unforeseen information technology failure.

In this situation it is likely that the ACNC Commissioner would accept an application for a late objection lodgement from Jerry.

### Example 12.2

Carrie is the contact officer for an entity applying to be registered under this Bill and is dissatisfied with a decision of the ACNC Commissioner. However, before she can lodge the objection with the ACNC in the review period, there is a devastating natural disaster in her location.

In this situation, it is likely that the ACNC Commissioner would accept an application for a late objection lodgement from Carrie.

### Example 12.3

Priyanka is the responsible entity for a registered entity under the Bill and is dissatisfied with a decision of the ACNC Commissioner and wishes to lodge an objection.

However, the review period ends one month before the latest financial statements are ready and Priyanka applies for late lodgement of the objection to take account of the latest financial statement.

In this situation, it is likely that the ACNC Commissioner would accept an application for a late objection lodgement from Priyanka.

12.24 After considering the late lodgement request, the ACNC Commissioner must make a decision to accept or reject the request and give the entity written notice of that decision. [*Subsections 160-10(4) and (5)*]

12.25 Where the ACNC Commissioner accepts the request, then the objection is treated as if it was lodged within the review period. However, where the ACNC Commissioner rejects the request, the objection will be refused and the entity can then apply to the AAT for review of the extension of time refusal decision. [*Subsections 160-10(6) and (7)*]

### ***Making the decision***

12.26 Once an objection has been lodged with the ACNC Commissioner in the approved form and within the review period, the ACNC Commissioner is required to consider the grounds on which the

objection was made and make a decision about whether to allow the objection, wholly or in part, or disallow it. [Subsection 160-15(1)]

12.27 This decision of the ACNC Commissioner is referred to as an **objection decision** and the ACNC Commissioner must, after making the objection decision, provide the entity with written notice of the decision. [Subsections 160-15(2) and (3)]

12.28 This written notice will notify the entity of the ACNC Commissioner's objection decision and set out any further review and appeal rights open to the entity under Part 7-2 of this Bill. The written notice will also inform the entity that they may request a statement of reasons for the objection decision as per their rights under subsection 28(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act).

12.29 Where the entity decides to request the ACNC Commissioner to provide a written notice providing a statement of reasons for the objection decision, the ACNC Commissioner shall provide this notice to the entity as soon as practicable but, in any case, within 28 days of making the request.

12.30 Pursuant to section 28 of the AAT Act, the statement of reasons should set out the findings on the material questions of fact, make reference to material or other information on which those findings were based, and provide clearly articulated reasons for the decision.

#### ***Requiring the ACNC Commissioner to make a decision***

12.31 Under this Bill, if an entity has lodged an objection with the ACNC Commissioner in accordance with the requirements of section 160-5, they can, by written notice, require the ACNC Commissioner to make an objection decision where that decision has not been made within a particular timeframe. [Subsection 160-20(1)]

12.32 That timeframe is the later of:

- 60 days after the day that the objection was lodged with the ACNC Commissioner (otherwise referred to as the **objection day**); and
- 60 days after the ACNC Commissioner has received the necessary information, in the case where the ACNC Commissioner requires the entity to give further information relating to the objection (so long as the ACNC Commissioner requested this further information within the original 60 day period following the lodgement of the objection).

*[Paragraph 160-20(1)(b)]*

12.33 To clarify further, the objection day referred to above is also intended to mean the day on which the ACNC Commissioner agrees to allow a late objection lodgement. *[Subsection 160-20(2)]*

12.34 Where an entity provides the ACNC Commissioner with a written notice requiring a decision to be made, the ACNC Commissioner then has 60 days to make an objection decision. If no decision has been made by then, the ACNC Commissioner is taken to have disallowed the objection, allowing the entity to move to the next stage of the review and appeal process. *[Subsection 160-20(3)]*

### **Reviewing an objection decision or an extension of time refusal decision by the AAT**

12.35 Division 165 of this Bill enables entities to apply to the AAT where they are dissatisfied with the ACNC Commissioner's objection decision or refusal to provide an extension of time decision (collectively referred to as a 'Commissioner's decision' for the rest of this Chapter). *[Paragraph 160-25(a) and subsection 160-10(7)]*

12.36 Only entities that are directly affected by a decision of the ACNC Commissioner can apply for an independent review of the Commissioner's decision by the AAT. This is consistent with the framework for objections to an administrative decision.

12.37 When making an application to the AAT for review, the entity is limited to arguing on the grounds stated in the objection to which the relevant decision relates. This is intended to ensure that the AAT has sufficient knowledge and information to handle the objection and that only relevant facts are considered to promote administrative efficiency by limiting the scope of appeals to directly relevant issues. *[Paragraph 165-40(a)]*

12.38 The entity, when making an application to the AAT, also has the burden of proving that the Commissioner's decision is wrong and should have not been made, or should have been made differently. *[Paragraph 165-40(b)]*

12.39 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.

12.40 Both limiting the grounds of objection and placing the burden of proof on the applicant is consistent with Part IVC of the TAA 1953 and it is intended that this Bill operate in the same manner.

12.41 Entities that apply to the AAT for review of a decision are required to comply with the Commissioner's decisions until the AAT review is finalised, and the AAT amends or revokes the decision. *[Section 165-50]*

12.42 The fact that a registered entity or responsible individual has applied for an AAT review or is granted an AAT review cannot be used as an excuse to fail to implement or comply with a decision of the ACNC Commissioner.

12.43 Entities are required to comply with the Commissioner's decision until the AAT review is finalised because it will often be the case that the Commissioner's decisions will have flow-on implications for the work of other government departments and agencies. For that reason, it is necessary to ensure that the Commissioner's decision remains in place until the review and appeal process has concluded.

12.44 This ensures that decisions of other government departments and agencies, including the Commissioner of Taxation, are not required to be amended multiple times causing uncertainty for the registered entity and potentially increasing administrative costs for government departments and agencies.

12.45 Once the AAT's decision on the review of a Commissioner's decision has become final, the ACNC Commissioner has 60 days to implement the AAT's decision. This includes amending any determination as is necessary to give effect to the decision. *[Section 165-45]*

12.46 For the purposes of determining when a decision is final, where no such appeal has been made within the appeal period, then the AAT's decision is taken as final and must be implemented by the ACNC Commissioner after 60 days. *[Subsection 165-45(2)]*

#### ***Modifications to the application of the AAT Act to this Bill***

12.47 Under this Bill there are modifications to the manner in which the AAT Act applies to a Commissioner's decision.

12.48 The modifications are made to promote transparency and accountability over the operations and activities of the sector, promote administrative efficiency, and make provisions specific to the documents and notices that the ACNC Commissioner will provide.

12.49 These modifications are also modelled on Part IVC of the TAA 1953 and are intended to operate in the same manner.

*Modifications to sections 27, 41 and 44A of the AAT Act*

12.50 Under this Bill, sections 27 and 41 of the AAT Act do not apply to a Commissioner's decision and section 44A of the AAT Act will not apply to objection decisions only. [Section 165-10]

Section 27 of the AAT Act

12.51 Section 27 of the AAT Act allows an application to be made to the AAT for a review of a decision by or on behalf of any person, or persons, whose interests are affected by the decision.

12.52 The AAT Act defines an association of persons to have interests that are affected by a decision if the decision relates to a matter which is included in the objects or purposes of the association.

12.53 This provision would allow persons or entities beyond those that are directly affected by the decision to apply for a review.

12.54 The charities sector is made up of an estimated 56,000 entities. It is possible that decisions which relate to, for example, registration, could affect a large segment of the sector. Under this AAT Act provision, a large segment of the sector and public (including donors and members) would potentially be able to apply for a review which would be an inefficient use of government resources, as well as those of the registered entity.

12.55 Likewise, were section 27 of the AAT Act to apply to a Commissioner's decision, entities that would apply under section 27 but were affected indirectly by the decision, may not have access to private information considered in objection decisions.

12.56 The modification ensures that only well-informed registered entities or responsible entities (those entities directly affected by decisions) are able to initiate an AAT review.

12.57 Entities indirectly affected by decisions would not be able to initiate AAT reviews, however, they would have the right to become party to an initiated review which would allow the review to cover important tangential issues of relevance. See paragraph 12.76 of this Chapter.

Section 41 of the AAT Act

12.58 Section 41 of the AAT Act allows the AAT to make an order varying or revoking the objection decision related to the review prior to

completion of the review, if the AAT is of the view that the order would be appropriate for the purposes of securing the effectiveness of the hearing.

12.59 The section also allows the person who made the decisions, in this case the ACNC Commissioner, to make a submission in relation to the matter.

12.60 Providing the AAT with the authority to amend or vary the ACNC Commissioner's objection decision without having conducted a full review could undermine the authority of the ACNC Commissioner and create uncertainty for the sector.

12.61 The ACNC Commissioner's decisions will have flow-on implications for the work of other government departments and agencies. Given these linkages, providing the AAT with the authority to change objection decisions made by the ACNC Commissioner without a full review would introduce administrative costs for these other departments and agencies who would have to change tax assessments, the issuance of grants or similar decisions on multiple occasions.

12.62 Furthermore, it would also result in the AAT authorising the spending of public monies, a responsibility that appropriately rests with the agency authorised to do so by the Parliament.

12.63 Such decisions may also undermine the object of this Bill by affecting the public's reliance on the ACN Register because an entity's registration may change multiple times in respect of the same period.

12.64 The Bill currently employs the tax law review and appeal model so that decisions of the ACNC Commissioner and of the Commissioner of Taxation can be managed together in any review by the AAT or by the Courts.

12.65 There are a number of reasons why this single review model is used for the ACNC. Allowing decisions of both the ACNC Commissioner and the Commissioner of Taxation to be reviewed together ensures that compliance costs and administrative expense are minimised. Furthermore, it prevents erosion of tax system integrity. Finally, it ensures the equitable treatment of all taxpayers.

12.66 Despite provisions in the Bill which modify this section of the AAT Act, the ACNC Commissioner retains the ability to offer a registered entity an administrative stay of the review or appeal decision, in certain circumstances.



12.67 The ACNC Commissioner may negotiate with a registered entity to allow the entity to continue to operate as if registered with the ACNC, pending the outcome of the review or appeal process, similar to the administrative concession offered by the Commissioner of Taxation. This negotiation would take into consideration the Commissioner of Taxation's views about the revenue at risk, the potential risk to donors and the legitimacy of the basis on which an entity reviews or appeals a decision (that is, whether the entity is merely attempting to delay a decision, or not).

12.68 In negotiating an administrative stay of a decision, the ACNC Commissioner must have regard for the need to consult with other regulators to ensure that an administrative stay of a decision is appropriate in each circumstance. This is because the ACNC Commissioner's decision can have significant implications for other Commonwealth regulatory systems, including the tax system, prudential regulatory system and money laundering and terrorist financing regulation.

#### Section 44A of the AAT Act

12.69 In cases where there is an appeal to the Federal Court of Australia, section 44A of the AAT Act allows the courts to make orders varying or affecting the operations or implementation of the ACNC Commissioner's objection decision.

12.70 The policy reasons for why section 44A of the AAT Act should not apply to objection decisions made by the ACNC Commissioner are the same as those given for section 41 of the AAT Act as described above.

12.71 As explained under the heading 'Section 41 of the AAT Act' above, the ACNC Commissioner can negotiate with a registered entity an administrative stay to allow the registered entity to operate as if it were registered with the ACNC pending a decision, in low-risk cases.

#### *Modification to section 29 of the AAT Act*

12.72 Section 29 of the AAT Act sets out the processes and framework for applying for an AAT review.

12.73 The modification to section 29 of the AAT Act within this Bill makes it clear that applications must be in writing, lodged with the AAT, and lodged within 60 days after the entity making the application is served with the ACNC Commissioner's written notice of the objection decision.  
*[Section 165-15]*

12.74 The 60-day timeframe ensures consistency with the time period for lodging objections with the ACNC Commissioner.

12.75 The modifications within the Bill are identical to those made in section 14ZZC of the TAA 1953.

*Modification to section 30 of the AAT Act*

12.76 Subsection 30(1A) of the AAT Act allows other persons whose interests are affected by the decision which is being reviewed by the AAT to apply to become a party to the proceedings.

12.77 The modification to subsection 30(1A) of the AAT Act in this Bill makes clear that the person making application to be party to the proceedings consents to the order made by the AAT. *[Section 165-20]*

12.78 This enables entities indirectly affected by decision to become party to an initiated review which would allow the review to cover tangential issues of relevance.

*Modification to section 37 of the AAT Act*

12.79 Subsection 37(1) of the AAT Act provides guidance to the person with the authority to make objection decisions, in this case the ACNC Commissioner, on the documents that have to be lodged with the AAT.

12.80 It also provides the AAT with authority to shorten deadlines and request documents setting out reasons for objection decisions, and outlines situations where the person with the authority to make objection decisions is not required to lodge documents.

12.81 The proposed modifications to section 37 of the AAT Act in this Bill simplify these requirements leaving no uncertainty over the documents and information the ACNC Commissioner would have to provide the AAT, and makes the wording consistent with the documents and notices issued by the ACNC. *[Paragraph 165-25(1)(a)]*

12.82 Subsection 37(2) of the AAT Act provides for the AAT to request other documents or information that it feels may be required to conduct its review in an effective manner.

12.83 Modifications to this provision under this Bill allow the AAT to make requests orally at a conference as defined in the AAT Act, and allow the AAT to request a list of documents that is in the person's possession or under the person's control. *[Paragraph 165-25(1)(b)]*

12.84 This simplifies the authority for the AAT to request relevant information and extend authority to allow the AAT to request a list of documents, including in a conference setting. *[Section 165-25]*

12.85 A related consequential modification will also be made to section 38 of the AAT Act so that a reference to paragraph 37(1)(a) of the AAT Act within section 38 is instead read as a reference to subparagraph 165-25(1)(a)(i) of the Bill. *[Section 165-30]*

*Modification to section 43 of the AAT Act*

12.86 Section 43 of the AAT Act mandates that the AAT give reasons orally or in writing for its decision, and provides parties to the proceeding the right to request reasons in writing from the AAT.

12.87 The modification to section 43 of the AAT Act in this Bill ensures that the AAT has the authority to publish decisions related to both private and public hearings. This extension is particularly important for an objection decision of the ACNC Commissioner as the sector is comprised of entities that operate for the public benefit and it is necessary that this information be made public to promote transparency and accountability in the NFP sector. *[Section 165-35]*

## **Reviewing an objection decision by the courts**

12.88 Under the review and appeal framework of this Bill, an entity who is dissatisfied with an objection decision of the ACNC Commissioner has the right to appeal to the courts. *[Paragraph 160-25(b)]*

12.89 To have the decision reviewed by the courts the entity must lodge an appeal with the relevant court within 60 days of receiving written notice from the ACNC Commissioner of the objection decision. *[Section 170-5]*

12.90 When making an appeal to the court, the entity is limited to arguing on the grounds stated in the objection to which the relevant decision relates. They also have the burden of proving that the ACNC Commissioner's decision is wrong and should not have been made, or should have been made differently. *[Section 170-10]*

12.91 This is consistent with the treatment for entities having the decision reviewed by the AAT as explained at paragraph 12.38 of this Chapter.

12.92 The court may make any order it sees fit when hearing an appeal against an objection decision. This would include an order to confirm or vary the objection decision. *[Section 170-15]*

12.93 Where the court makes an order that is final, the ACNC Commissioner has 60 days to do all things necessary to implement the court's decisions. This provides adequate time for the ACNC

Commissioner to go through required administrative processes to implement the courts' findings. *[Subsection 170-20(1)]*

12.94 A court order is final when no appeal is lodged against the order within the period for lodging an appeal. Where the only possible appeal against the order is to the High Court of Australia with special leave, and no application for special leave is made within the period of 30 days after the order is made, then the order will also be considered final. *[Subsection 170-20(2)]*

12.95 The fact that an appeal is pending does not interfere with, or affect, the objection decision. This ensures that the ACNC Commissioner's authority is not undermined and limits any uncertainty for the NFP sector related to the application of objection decisions once an appeal to the Courts has been, or is being, lodged. *[Section 170-25]*

12.96 Decisions of the ACNC Commissioner have flow-on effects for the work of other government departments and agencies. Given these inter-linkages, ensuring that objection decisions remain valid until otherwise determined ensures compliance costs for NFPs and administrative costs for governments are not increased unnecessarily.

### **Making a combined application for AAT review or appeal to the court**

12.97 Under this Bill, entities that are dissatisfied with a decision of the ACNC Commissioner and are also intending to apply for a review or appeal of a related administrative decision taken by another government agency or department, either simultaneously or sequentially, are able to make a joint action in certain circumstances. *[Sections 165-55 and 170-30]*

12.98 A government agency or department for the purposes of combined appeals to the AAT is intended to include all Commonwealth government agencies or departments.

12.99 In respect to combined appeals to the court, this would include a decision made by an Australian government agency which as defined in this Bill includes the Commonwealth, a State or a Territory or an authority of the Commonwealth or of a State or a Territory. *[Subparagraph 170-30(1)(a)(ii)]*

12.100 Entities may make a combined application for AAT review or a combined appeal to the court and the AAT, and the relevant court may deal with the decisions together where:

- the decisions are directly related; and

- it would be useful from a procedural and efficiency perspective to consider decisions jointly.

*[Sections 165-55 and 170-30]*

12.101 The need for joint actions under this Bill arises from the linkage between a decision of the ACNC Commissioner to register an entity and the fact that ACNC registration will be a necessary precondition for entities to access other forms of Commonwealth government support.

12.102 In this instance, Commonwealth government support includes, but is not limited to, access to tax concessions, exemption from regulations and access to government grants and contracts.

12.103 If an entity's registration is altered by a reviewable decision of the ACNC Commissioner, then there will potentially be flow on effects to the range of government support the entity can lawfully access and, more relevantly, reviewable decisions of other government agencies and departments.

12.104 Having joint actions under this Bill is intended to promote cost savings and administrative efficiency for the NFP sector, as well as ensuring that the totality of issues are considered by the AAT or courts when reviewing and assessing decisions taken by the ACNC Commissioner, and related decisions made in other Commonwealth government agencies and departments.



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## **Chapter 13**

### **Miscellaneous**

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#### **Outline of chapter**

13.1 This Chapter explains common rules which govern the operation of administrative matters, including:

- the requirements for approved forms for material given to the Australian Charities and Not-for-profits Commission Commissioner (ACNC Commissioner);
- the requirements for address for service rules;
- how some core concepts have been defined;
- administration penalties for late lodgement and false and misleading statements; and
- how the new law imposes certain obligations, liabilities or offences on specific responsible entities.

#### **Summary of new law**

13.2 The Bill sets out the common rules which govern the operation of administrative matters of the ACNC. In particular, there are requirements for the approved forms for material given to the ACNC Commissioner, address for service rules, as well as administrative penalties for registered entities for late lodgement and false and misleading statements.

13.3 This Chapter also explains the imposition of certain obligations, liabilities or offences on specific responsible entities, as well as outlining some other core concepts.

## Detailed explanation of new law

### Approved forms

13.4 The approved form rules set out matters such as the standard manner in which certain information must be provided to the ACNC Commissioner including how that information is to be set out, what is to be included or appended, who can sign-off on the materials and the mechanism in which it is to be provided.

13.5 The rules help provide for administrative efficiency and simplicity in the operation of the ACNC.

13.6 The approved form is determined as an administrative function of the ACNC Commissioner and does not constitute a legislative instrument.

13.7 The Bill provides for the ACNC Commissioner to approve the form of certain information that the ACNC routinely collects such as returns, applications, notifications and statements.

13.8 The rules also allow the ACNC Commissioner to determine how information is to be provided to the ACNC Commissioner, such as whether it may be provided in a paper form or a virtual form, and where the document is given, for example, electronically or by telephone.

13.9 These rules have been based on similar requirements contained in other Commonwealth laws, including the *Taxation Administration Act 1953*.

13.10 Information is in the *approved form* if it meets all the following requirements:

- it is in the form approved by the ACNC Commissioner for that kind of document;
- it contains a declaration that the information provided is true and correct, signed by an entity or entities as the form requires;
- it contains the information that the form requires, and any further information, statement or document as the ACNC Commissioner requires, whether in the document or otherwise; and
- if it is to be given to the ACNC Commissioner, it is given in the manner that the ACNC Commissioner requires.



*[Subsection 190-10(1)]*

13.11 If an entity provides a document to the ACNC Commissioner that satisfies all the above requirements, except for the requirement that it contains any further information, statement or document as required by the ACNC Commissioner, the document is also in the approved form, if it contains the other information required by the ACNC Commissioner.

*[Subsection 190-10(2)]*

13.12 The ACNC Commissioner must specify the further information, statement or document that is required in writing. *[Subsection 190-10(2)]*

13.13 The ACNC Commissioner may combine more than one document (for example two notices, or a statement and an application) into the same approved form. *[Subsection 190-10(3)]*

13.14 The ACNC Commissioner may approve a different approved form for different entities. For example, the ACNC Commissioner may require medium and large registered entities to lodge a different annual information statement to that lodged by small registered entities.

*[Subsections 190-10(4) and note in subsection 190-10(4)]*

13.15 The ACNC Commissioner may also defer the time by which information is to be provided to the ACNC Commissioner, or to another entity, in the approved form. *[Section 190-15]*

***Declaration by an entity***

13.16 If an entity gives a document to the ACNC Commissioner in the approved form, the entity must make a declaration in the approved form that any information in the document is true and correct. *[Section 190-20]*

13.17 This gives assurance to the ACNC Commissioner that the entity has provided accurate information.

***Declaration by an entity where an agent gives a document***

13.18 If a document is to be given to the ACNC Commissioner in the approved form by an agent on the entity's behalf, the entity must make a declaration in writing:

- stating that the entity has authorised the agent to give the document to the ACNC Commissioner; and
- declaring that any information the entity provided to the agent for preparation of the document is true and correct.

*[Subsection 190-25(1)]*

13.19 The entity must give the declaration to the agent.  
*[Subsection 190-25(2)]*

13.20 The entity must retain the declaration or a copy of the declaration for:

- seven years after it is made; or
- a shorter period determined by the ACNC Commissioner in writing for the entity; or
- a shorter period determined by the ACNC Commissioner by legislative instrument for a class of entities that include the entity.

*[Subsection 190-25(3)]*

13.21 A determination made by the ACNC Commissioner may specify different periods for different classes of entities. *[Subsection 190-25(4)]*

13.22 An entity must produce the declaration or copy if requested to do so within that period by the ACNC Commissioner. *[Subsection 190-25(5)]*

13.23 The agent must not give the document to the ACNC Commissioner before the entity makes the declaration.  
*[Subsection 190-25(6)]*

13.24 The entity must sign the declaration. *[Subsection 190-25(7)]*

***Declaration by an agent***

13.25 If an agent gives a document to the ACNC Commissioner in the approved form on behalf of another entity, the agent must, if the document so requires, make a declaration in the approved form stating that:

- the document has been prepared in accordance with the information supplied by the other entity; and
- the agent has received a declaration from the other entity stating that the information provided to the agent is true and correct; and
- the agent is authorised by the other entity to give the document to the ACNC Commissioner.

*[Section 190-30]*

### ***Signing declarations***

13.26 An entity must sign a declaration in a document the entity gives to the ACNC Commissioner in paper form. *[Subsection 190-35(1)]*

13.27 If an entity's agent gives a document to the ACNC Commissioner on the entity's behalf in paper form the document must contain:

- if the document so requires — a declaration made by the entity with the entity's signature; and
- if the document so requires — a declaration made by the agent with the agent's signature.

*[Subsection 190-35(2)]*

13.28 Any document of an entity's that is lodged electronically:

- if the entity gives it to the ACNC Commissioner – must contain the entity's declaration with the entity's electronic signature; or
- if the entity's agent gives it to the ACNC Commissioner – must contain the agent's declaration with the agent's electronic signature.

*[Subsection 190-35(3)]*

### **Address for service**

13.29 The new law sets out rules for how the ACNC can serve documents on registered entities (or on responsible entities of registered entities). This includes documents such as directions, warnings and penalty notices.

13.30 These rules require registered entities to keep their details up-to-date with the ACNC to ensure they receive all material sent to them.

13.31 By using the address for service, the ACNC Commissioner can presume that documents have been served to the registered entity.

13.32 Failure to update an address with the ACNC may lead to a registered entity failing to fulfil an important obligation.

13.33 Registered entities are required to notify the ACNC Commissioner if they change their address for service. This is explained in detail in Chapter 7 — Duty to notify.

13.34 Maintaining an up-to-date address for service makes sure that registered entities are able to receive all directions and other information from the ACNC Commissioner, ensuring they meet (and not avoid) their regulatory obligations.

13.35 It is important for registered entities to regularly check their electronic and physical mail to ensure they are able to meet their regulatory obligations.

13.36 An entity's *address for service* can be a physical address in Australia, a postal address in Australia or an electronic address that the entity has given the ACNC Commissioner for the purposes of receiving documents from the ACNC. [*Subsection 195-5(1)*]

13.37 If an entity has given the ACNC Commissioner more than one address for service, the Bill allows the ACNC Commissioner to choose the address that the ACNC Commissioner reasonably believes to be the address for service in the circumstances. [*Subsection 195-5(2)*]

13.38 If an entity has not given the ACNC Commissioner an address for service the ACNC Commissioner may use an address that he or she reasonably believes to be the entity's address for service. [*Subsection 195-5(3)*]

### **Example 13.1**

Noad Inc is a registered entity. Noad Inc has not given an address for service to the ACNC Commissioner. The ACNC Commissioner needs to serve a document on Noad Inc. The Australian Securities and Investments Commission (ASIC) has an address for Noad Inc. The ACNC Commissioner may use that address to serve the document on Noad Inc.

### ***How documents may be given***

13.39 A document (however described) may be given to an entity:

- in the manner specified in section 28A of the *Acts Interpretation Act 1901*;
- if the entity's address for service is an electronic address — by sending it to that address;

- if the entity is a company and a liquidator of the company has been appointed — by leaving it at, or posting it to, the address of the liquidator’s office in the most recent notice of that address lodged with ASIC; or
- if the entity is a company and an administrator of the company has been appointed — by leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC.

[Subsection 195-10(1)]

13.40 Despite section 29 of the *Acts Interpretation Act 1901*, a document given under the Bill is taken to be given at the time the ACNC Commissioner leaves or posts it. [Subsection 195-10(2)]

### Example 13.2

The Paper Charity has an address for service registered with the ACNC. The ACNC Commissioner needs to serve a notice on The Paper Charity. The ACNC Commissioner sends the notice by post to the address for service held for The Paper Charity on 2 February 2013. The notice is taken to be given to The Paper Charity on 2 February 2013.

13.41 This Division of the Bill has effect despite paragraphs 9(1)(d) and (2)(d) of the *Electronic Transactions Act 1999*. [Subsection 195-10(3)]

## Core concepts

### Entity

13.42 The new law uses the concept of ‘entity’ as a broad term to refer to any individual or body.

13.43 The NFP sector is comprised of many diverse entities. The term entity is used as a general term throughout the Bill to reflect the diversity of the NFP sector.

13.44 The term *entity* is used to refer to any of the following:

- an individual;
- a body corporate;
- a body politic;

- any other unincorporated association or body or persons;
- a trust.

*[Subsection 205-5(1)]*

13.45 The term entity is used through the Bill in a number of different, but related senses. It covers all kinds of legal person. It also covers groups of legal persons, and other things, that in practice are treated as having a separate identity in the same way as a legal person does. *[Note in subsection 205-5(1)]*

13.46 Any other unincorporated association or body or persons does not include a non-entity joint venture (within the meaning of the *Income Tax Assessment Act 1997*). *[Subsection 205-5(2)]*

13.47 The concept of an entity also distinguishes between the different capacities in which a legal person may act. For example, an individual acting in the capacity of a trustee will be treated as a separate entity from that individual acting in a personal capacity. This will remove the necessity to continually state that a particular provision only applies to an individual otherwise than in the capacity of trustee.

13.48 The trustee of a trust is taken to be an entity consisting of the person who is the trustee, or the persons who are the trustees, at any given time. *[Subsection 205-5(3)]*

13.49 This is because a right or obligation cannot be conferred or imposed on an entity that is not a legal person. *[Note 1 in subsection 205-5(3)]*

13.50 The entity that is the trustee of a trust does not change merely because of a change in the person who is the trustee of the trust, or persons who are the trustees of the trust. *[Note 2 in subsection 205-5(3)]*

13.51 A legal person can have a number of different capacities in which the person does things. In each of those capacities, the person is taken to be a different entity. *[Subsection 205-5(4)]*

13.52 For example, in addition to his or her personal capacity, an individual may be a sole trustee of one or more trusts; and one of a number of trustees of a further trust. In his or her personal capacity, he or she is one entity. As trustee of each trust, he or she is a different entity. The trustees of the further trust are a different entity again, of which the individual is a member. *[Example in subsection 205-5(4)]*

13.53 If a provision refers to an entity of a particular kind, it refers to the entity in its capacity as that kind of entity, not to that entity in any other capacity. *[Subsection 205-5(5)]*

13.54 For example, a provision that refers to a company does not cover a company in a capacity as trustee, unless it also refers to a trustee. *[Example in subsection 205-5(5)]*

13.55 Because obligations are placed on registered entities generally, other rules are required to explain how the law is to be applied where the entity is not a legal entity. See heading below — Obligations, liabilities and offences.

### **Small, medium and large registered entities**

13.56 The concepts small, medium and large registered entities are used throughout this Bill to differentiate NFP entities based on their revenue.

13.57 Tiered registration of NFP entities ensures proportionality of reporting and other requirements for registered entities of different sizes.

13.58 A registered entity is a ***small registered entity*** in a particular financial year if the revenue of the registered entity for the financial year is less than \$250,000, or any other amount prescribed by the regulations for the purposes of determining tier thresholds. *[Subsection 205-25(1)]*

13.59 A registered entity is a ***medium registered entity*** in a particular financial year if:

- it is not a small registered entity in the financial year; and
- the revenue of the registered entity for the financial year is less than \$1,000,000, or any other amount prescribed by the regulations for the purposes of determining tier thresholds.

*[Subsection 210-10(2)]*

13.60 A registered entity is a ***large registered entity*** in a particular financial year if it is not a small registered entity or a medium registered entity in the financial year. *[Subsection 205-25(3)]*

13.61 Revenue is to be calculated for the purposes of this section in accordance with accounting standards in force at the relevant time (even if the standard does not otherwise apply to the financial year of the registered entity concerned). *[Subsection 205-25(4)]*

13.62 The ACNC Commissioner may continue to treat a registered entity as either a small, medium or large registered entity for a financial year if the ACNC Commissioner is of the opinion that the entity was a registered entity of that size for the previous financial year, and the entity, while not being of that size for the current financial year, is likely to return to that size during the next financial year. [Subsection 205-25(5)]

13.63 This provision allows for the ACNC Commissioner to use discretion to allow for certain circumstances that may make it inappropriate for an entity to move between the small, medium and large thresholds.

13.64 For example, a previously small registered entity disposes of a capital asset in a particular financial year and this produces a large amount of revenue, causing the entity to move beyond the threshold of a small registered entity, and into the threshold of a medium registered entity. As this is an uncommon event and the entity is likely to be a small registered entity in the next financial year, the ACNC Commissioner may continue to treat the entity as a small registered entity, even though it is a medium registered entity in that particular financial year.

13.65 The tiered framework minimises the compliance burden placed on registered entities, while striking a balance with accountability and transparency.

13.66 The tiered framework ensures that all registered entities provide standardised information which is useful to the public, for example to allow members of the public to make meaningful assessments of registered entities in considering whether to volunteer for, or donate to, these organisations.

13.67 For further information see Chapter 6 – Reporting and record keeping.

## **Responsible entities**

13.68 The concept of responsible entity identifies individuals and other entities that are responsible for the decision-making, day-to-day management and compliance of a registered entity.

13.69 The term responsible entity is used throughout the new law to identify entities to whom responsibilities and liabilities in relation to registered entities fall.

13.70 Each of the following is a *responsible entity* of a registered entity.



13.71 In the case of a registered entity that is a company, the responsible entities are the directors. *[Paragraph 205-30(a)]*

13.72 In the case of a registered entity that is a trust the responsible entities are each of the following:

- a trustee of the registered entity;
- if a trustee of the registered entity is a body corporate — a director of the trustee.

*[Paragraph 205-30(b)]*

13.73 A person who is any of the following:

- a trustee in bankruptcy of the registered entity;
- a receiver, or receiver and manager, of the property of the registered entity;
- an administrator of the registered entity;
- an administrator of a deed of a company arrangement executed by the registered entity;
- a liquidator of the registered entity; or
- a trustee or other entity administering a compromise or arrangement made between the registered entity and someone else.

*[Paragraph 205-30(c)]*

13.74 For an incorporated association the responsible entities are members of the management committee.

13.75 The law also looks to corporate responsible entities (such as corporate trustees) to identify other responsible entities who control the mind and will of the registered entity (such as directors of a corporate trustee of a registered entity that is a trust).

## **Company**

13.76 In this Bill the term *company* means:

- a body corporate; or

- any unincorporated association or body of persons; but does not include a partnership.

*[Section 205-10]*

### **Basic religious charity**

13.77 The term basic religious charity is used throughout this Bill to identify certain registered entities that have different obligations and requirements under the Bill.

13.78 A ***basic religious charity*** is an entity that meets all of the following requirements:

- it is a registered entity;
- it is registered as the type — charity and as the subtype — entity with a purpose that is the advancement of religion; and
- it is not entitled to be registered as any other subtype.

*[Subsection 205-35(1)]*

13.79 An entity would not be entitled to be registered with another subtype to the extent that its activities in that subtype are merely ancillary and incidental to its subtype registration. For example, a church that is registered with the subtype – entity with a purpose that is the advancement of religion occasionally provides clothes and food vouchers to families that attend their church services and that are experiencing poverty. This service is not provided frequently, and is merely incidental to the registered entity’s activities to advance religion.

13.80 An entity is not a ***basic religious charity*** if:

- it is a body corporate that is registered under the *Corporations Act 2001*;
- it is a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*;
- the entity is incorporated under a State or Territory Incorporated Associations Act;
- it is registered under the *Associations Incorporation Act 2005* of Norfolk Island; or

- it is registered under the *Companies Act 1985* of Norfolk Island.

*[Subsection 205-35(2)]*

13.81 An entity is also not a **basic religious charity** if it is a deductible gift recipient (DGR). *[Subsection 205-35(3)]*

13.82 An entity may still be considered a basic religious charity if it operates a fund, authority or institution as a separate entity that is a DGR, where the running of the DGR and all DGR funds are kept separate from the parent entity. For example, a church may operate a trust that is listed on the Register of Cultural Organisations as a DGR. The trust is a separate entity and has a separate bank account. All DGR funds are kept separate from the church. In this case, the church could still be considered a basic religious charity.

13.83 In the case where a church operates a fund, authority or institution that is a DGR, but where all the church and DGR funds are kept in one bank account the church would not be considered a basic religious charity.

13.84 In this case, the church would have to separate the DGR fund, authority or institution so that the DGR can report separately. In this case, the church could then be considered a basic religious charity.

13.85 An entity is also not a **basic religious charity** at a time in a financial year if the ACNC Commissioner has allowed it (together with one or more other entities) to form part of a reporting group for the year under section 60-95. *[Subsection 205-35(4)]*

13.86 An entity is also not a **basic religious charity** at a time if the total of the grants (however described)(if any) it receives from Australian government agencies in a financial year exceeds \$100,000; in any of these financial years:

- the financial year in which the time occurs; or
- either of the previous two financial years.

*[Subsection 205-40(5)]*

13.87 This requirement will only apply from the 2013-14 financial year. That is to say, if a registered entity receives a grant in the 2012-13 financial year or an earlier financial year, the registered entity will not be excluded from being considered a basic religious charity.

13.88 The definition of Australian government agency used in the Bill does not include local government bodies. Accordingly, an entity may receive grants to any value from a local government body and, providing it meets all other requirements, could still be considered a basic religious charity.

## **Governing rules**

13.89 **Governing rules** are those documents of an NFP entity that set out its purposes and how it is to be run. Governing rules may include a constitution, association rules, cooperative rules, memorandum and articles of association, legislation, a trust deed or church law.  
*[Section 300-5]*

13.90 Governing rules cover a broad range of topics, including rules about an entity's mission, procedures for when an entity winds up, removal of members, how the governing rules can be altered and what happens when an officer of the entity resigns from his or her position.

13.91 An entity's governing rules may be drawn from more than one source.

13.92 For example, a church parish may be subject to governing rules set at an Australia-wide, or world-wide, level, as well as to governing rules established at the parish level.

13.93 The content of the governing rules must be binding on the registered entity. Rules that allow an entity to do certain things, but do not bind them to do certain things, are not sufficient.

13.94 A registered entity must notify the ACNC Commissioner of any changes made to their governing rules — see Chapter 7 — Duty to Notify.

13.95 In addition, the Governor-General may make regulations relating to the governance standards which cover the content of a registered entity's governing rules.

## **Administrative Penalties**

13.96 The Bill establishes a regime for administrative penalties.

13.97 Penalties can be administrative, civil or criminal. Civil and criminal penalties are imposed by the courts, whereas administrative penalties are imposed without the need for court action.

13.98 The ACNC will rely on entities providing correct information to establish their eligibility for registration as a charity, and in the future, for other NFP statuses.

13.99 Where an entity fails to correctly report to the ACNC, this may lead to the incorrect registration of an entity and the subsequent provision of tax concessions and other benefits and exemptions where they should not have been provided. Incorrect reporting, or a failure to report, impacts on the public at large, through a reliance on incorrect information.

13.100 It is expected that administrative penalties in relation to an entity's dealings with the ACNC will not be imposed frequently. However, it is important that appropriate sanctions are put in place for those who seek to purposely mislead the ACNC Commissioner, whilst protecting those who unintentionally provide the ACNC Commissioner with incorrect information, having taken reasonable care not to.

13.101 The administrative penalties regime is proportional and dynamic. As such, there are more severe penalties for prolonged lateness, attempts to mislead the ACNC Commissioner and for providing deliberately false information. Conversely, penalties are more lenient where an entity voluntarily provides information.

### **False or misleading statements**

13.102 For the purposes of the administrative penalties regime, a statement may be made orally, in a document, or any other way (including electronically) for a purpose connected with the Bill. Administrative penalties also apply to statements made by an entity's agent as if they had been made by the entity. *[Section 175-5]*

### **Liability to penalty**

13.103 An entity is liable to an administrative penalty if the entity makes a false or misleading statement to the ACNC Commissioner or to an entity that is exercising powers or performing functions under the Bill. *[Paragraph 175-10(1)(a)]*

13.104 In this Bill, a statement may be false or misleading in a material particular whether because of things in it or omitted from it. *[Paragraph 175-10(1)(b)]*

13.105 An entity is also liable to an administrative penalty in these circumstances where a statement is made by an entity's agent as though it had been made by the entity. *[Note in paragraph 175-10(1)(b)]*

13.106 An entity is liable to an administrative penalty if the entity makes a false or misleading statement which is, or purports to be, one required or permitted by this Bill. An entity is liable where a statement is made to an entity other than the ACNC Commissioner or an entity exercising powers or performing functions under this Bill.

*[Subsection 175-10(2)]*

13.107 However, there is an exception for reasonable care. That is, an entity is not liable to an administrative penalty if the entity (or their agent where relevant) took reasonable care in connection with the making of the statement. *[Subsection 175-10(3)]*

### **Example 13.3**

Giving Incorporated makes a false or misleading statement to the ACNC Commissioner, but did so unintentionally. The entity is liable to an administrative penalty. If the entity is able to show that they took reasonable care to prevent making the misleading statement, no penalty will be imposed.

13.108 When an entity makes an error or omission in documentation, the ACNC Commissioner will take into account the relevant circumstances, such as, previous compliance history, when deciding what action to take, particularly in relation to pursuing administrative penalties.

## **Amount of penalty**

13.109 The Bill provides for a base penalty amount that may be increased or decreased according to certain factors, based on the culpability and actions of the registered entity. *[Section 175-15]*

13.110 The base penalty amount is worked out according to the table in the Bill which sets out the penalty units applicable to various types of false or misleading statements. *[Subsection 175-20(1)]*

13.111 There is a higher penalty for a statement that was false or misleading because of intentional disregard of the Bill by the entity or its agent than there is for a statement which was false or misleading because of recklessness by the entity or its agent.

13.112 A statement that was false or misleading because of a failure by the entity or its agent to take reasonable care to comply with the Bill is subject to a lesser penalty again. Whereas where an entity fails to give a document in accordance with the Bill where that document is necessary for the ACNC Commissioner to make a decision, the entity is subject to a higher penalty. *[Subsection 175-20(1)]*

13.113 The item that produces the greater base penalty amount will be used where more than one item in the table applies. *[Subsection 175-20(2)]*

13.114 An entity may have their base penalty amount reduced if the entity received information or advice from the ACNC Commissioner in some form which lead the entity to believe that the Bill operated in a certain way. *[Subsection 175-20(3)]*

13.115 Information published on the ACNC website is to be taken as having been approved by the ACNC Commissioner in writing for these purposes.

***Increase in penalty***

13.116 The Bill provides for circumstances where the base penalty is able to be increased by 20 per cent. An increase in the penalty will occur if the entity took steps to prevent or obstruct the ACNC Commissioner from finding out about the false or misleading nature of the statement. *[Paragraph 175-25(a)]*

13.117 The base penalty is increased by 20 per cent where the entity became aware of the false or misleading nature of the statement made to the ACNC Commissioner or another entity after the statement had been made and did not tell the ACNC Commissioner or the other entity about it within a reasonable time. *[Paragraph 175-25(b)]*

13.118 The penalty is also increased if the entity has been liable to a similar penalty previously. *[Paragraph 175-25(c)]*

13.119 This allows for the ACNC Commissioner to recognise differences between registered entities that have made every effort to comply with their obligations under the Bill, and those entities which have deliberately sought to mislead the ACNC Commissioner, or withhold information from the ACNC Commissioner. This ensures that the administrative regime is proportional and responsive to different circumstances.

***Reduction in penalty***

13.120 The Bill provides for circumstances where the base penalty is able to be reduced by 20 per cent where the entity voluntarily informs the ACNC Commissioner of the false or misleading statement.

13.121 The base penalty amount is reduced if the ACNC Commissioner tells the entity that an examination is to be made of the entity's affairs relating to this Bill and after this time the entity voluntarily tells the ACNC Commissioner, in the approved form, about the false or misleading

nature of the statement and telling the ACNC Commissioner will likely save the ACNC Commissioner a significant amount of time or resources. *[Subsection 175-30(1)]*

13.122 In recognition of the savings made to the time and resources of the ACNC Commissioner, the penalty amount is reduced to nil if the entity voluntarily tells the ACNC Commissioner, in the approved form, about the false or misleading nature of the statement before the day the ACNC Commissioner tells the entity that an examination is to be made in relation to the entity's affairs under the Bill. *[Paragraph 175-30(2)(a)]*

13.123 In the case where the ACNC Commissioner makes a public statement requesting entities to make a voluntary disclosure by a particular earlier day about a matter that applies to its affairs, the entity must voluntarily tell the ACNC Commissioner before that day to have the penalty amount reduced. *[Paragraph 175-30(2)(b)]*

13.124 The ACNC Commissioner has discretion to treat a voluntary statement as having occurred *before* being told about the examination, even if the voluntary statement is made *after* having been told about the examination, if the ACNC Commissioner considers it appropriate to do so in the circumstances. *[Subsection 175-30(3)]*

### **Failure to lodge documents on time**

13.125 The Bill sets out the penalties for failing to lodge documents on time.

13.126 Penalties for lodging documents late encourage registered entities to lodge documents on time.

13.127 If the ACNC Commissioner has documents on time, he or she can ensure that information on the Australian Charities and Not-for-profits Register is up to date, and that the ACNC Commissioner has the most accurate information for each registered entity on which to base administrative decisions.

#### ***Liability to penalty***

13.128 The ACNC Commissioner needs certain documents in order to make informed decisions in relation to entities registered with the ACNC. As such, it is important that the ACNC Commissioner has access to timely and accurate information.

13.129 Where an entity is required under this Bill to give a report, return, notice, statement or other document to the ACNC Commissioner



and the entity fails to do so in the required time the entity will be liable to an administrative penalty. [Section 175-35]

13.130 Proportional and appropriate penalties are required to ensure that registered entities have an incentive to comply with their obligations under the Bill.

#### ***Amount of penalty***

13.131 The amount of the penalty for failure to lodge documents on time varies as to the size of the entity. Medium and large entities are subject to proportionately higher penalties. Small entities will be required to pay the **base penalty amount** only. [Section 175-40]

13.132 Medium registered entities are required to pay double the base penalty amount. [Paragraph 175-40(1)(a)]

13.133 Large registered entities are required to pay five times the base penalty amount. [Paragraph 175-40(1)(b)]

13.134 The base penalty amount is one penalty unit for each period of 28 days or part of a period of 28 days starting on the day when the report, return, notice, statement or other document is due and ending when the entity gives the document. There is a maximum of five penalty units. [Subsection 175-40(2)]

13.135 Section 4AA of the *Crimes Act 1914* sets out the current value of a penalty unit. If this value changes, the base penalty amount is calculated using the amount applying at the start of the relevant 28 day period. [Note in paragraph 175-40(2)(b) and subsections 175-40(3)]

13.136 The ACNC Commissioner can notify the entity of the penalty before the entity actually provides the relevant report, return, notice or other document. If necessary, the amount of the penalty can be increased later, when the total amount is known. [Subsection 175-40(4)]

### **Machinery provisions for administrative penalties**

13.137 The Bill sets out the machinery provisions in relation to administrative penalties, such as the requirement of the ACNC Commissioner to give written notification of the penalty, the due date for the penalty, the power of the ACNC Commissioner to remit the penalty, interest charges on unpaid penalties, and the collection of the penalty by the Commissioner of Taxation.

13.138 The machinery provisions ensure that the administrative penalties operate as a flexible and effective enforcement mechanism.

13.139 The Bills give the ACNC Commissioner the power to remit all or part of an administrative penalty. This means that the ACNC Commissioner may decide that, although the penalty is imposed, that he or she will remove liability for the penalty because it is appropriate in the circumstances to do so. This can happen either by the ACNC Commissioner deciding not to issue a notice or by issuing a notice and later reducing any liabilities in part or in full.

13.140 This broad discretion allows the Commissioner to ensure that administrative penalties are only used in circumstances where it is appropriate to do so, ensuring that the Commissioner can be responsive to the unique aspects of the NFP sector, and recognise that administrative penalties should not be imposed if they would merely unfairly penalise those individuals who depend on the services provided by the entity in question.

13.141 Where an administrative penalty is imposed on an entity, the ACNC Commissioner must provide written notice to the entity, setting out the entity's liability to pay the penalty and the reasons behind the penalty. *[Sections 175-45 and 175-50]*

13.142 If the ACNC Commissioner is required to give a notice to the entity for another unrelated reason, the ACNC Commissioner can provide the penalty notice in the same document. *[Section 175-50]*

13.143 Where the ACNC Commissioner has issued a penalty notice, the penalty will be due for payment 14 days after the day specified in the notice. *[Section 175-55]*

13.144 This Bill provides the ACNC Commissioner with the power to remit all or part of an administrative penalty *[Section 175-60]*. This means that the ACNC Commissioner may decide that, although there is a liability for a penalty, that he or she will remove liability for the penalty because it is appropriate in the circumstances to do so.

#### **Example 13.4**

The ACNC Commissioner notifies Lizzie Inc., a registered entity, that a penalty will be imposed on Lizzie Inc. for making a false or misleading statement in its registration documentation. The date of the notice is 29 March 2013, meaning that the notice will be due for payment 14 days later, on 13 April 2013. The payment is due 14 days after the date specified on the notice, even though some of the days during that period were public holidays for the Easter period.

### Example 13.5

Following on from the example above, the ACNC Commissioner decides that it is not appropriate to collect the administrative penalty from Lizzie Inc. On 28 March 2013 there was a fire at the premises of Lizzie Inc. Therefore, Lizzie Inc. was unable to lodge on time. The ACNC Commissioner decides to remit the penalty in full, and notifies Lizzie Inc. accordingly. Lizzie Inc. is not required to pay the penalty.

13.145 Where the ACNC Commissioner decides not to remit the penalty, or to remit only part of the penalty, the ACNC Commissioner must give written notice of the decision and the reasons for the decision to the entity. [*Subsection 175-60(2)*]

13.146 Section 25D of the *Acts Interpretation Act 1901* sets out rules about the content of a statement of reasons [*Subsection 175-60(2) note*].

13.147 This does not mean the ACNC Commissioner needs to consider remission in all cases and give reasons each time. The ACNC Commissioner need only give reasons in cases where the ACNC Commissioner actively considers whether to exercise the discretion and decides not to.

13.148 In the routine course, the ACNC Commissioner would not be expected to consider remission unless requested to do so by the entity subject to the penalty.

13.149 Where the ACNC Commissioner decides to any extent not to remit an amount of penalty, and the amount of penalty payable after the refusal is more than two penalty units and the entity is dissatisfied with the decision, the entity may object against the decision according to the review and appeal provisions of the Bill. [*Subsection 175-60(3)*]

13.150 The general interest charge (GIC) will apply on unpaid penalty amounts arising under this Division. The GIC has the same meaning as under the *Taxation Administration Act 1953*.

13.151 If an entity fails to pay all or part of their penalty by the due date, the entity is liable to pay the GIC on the unpaid amount for each day the debt remains outstanding. The debt is calculated for each day starting at the beginning of the day on which the amount was due to be paid and finishing at the end of the last day where either the amount or the GIC on any of the amount, remains unpaid. [*Section 175-65*]

13.152 This Bill provides for the collection of the penalty by the Commissioner of Taxation. [*Section 175-70*]

13.153 When a notice is given, the penalty and any GIC in respect of the penalty becomes a tax-related liability under section 255-1 in Schedule 1 to the *Taxation Administration Act 1953*. The collection and recovery rules applying to these debts are located in Part 4-15 in Schedule 1 to the *Taxation Administration Act 1953*. [Subsection 175-70(2)]

13.154 For the purposes of Part IIB of the *Taxation Administration Act 1953*, the penalty and any GIC in respect of the penalty is a primary tax debt. This provision allows the Commissioner of Taxation to add the penalty to an entity's running balance account. [Subsection 175-70(1)]

13.155 To allow the Commissioner of Taxation to collect the debt, the ACNC Commissioner must notify the Commissioner of Taxation when he or she gives an entity a written notice. [Subsection 175-70(3)]

13.156 Following on from the paragraph above, the ACNC Commissioner must also notify the Commissioner of Taxation if he or she remits all or part of the penalty. [Subsection 175-70(4)]

13.157 If the ACNC Commissioner uses his or her discretion and does not issue a penalty notice to the registered entity because the ACNC Commissioner has remitted the penalty in full, the ACNC Commissioner is not required to notify the Commissioner of Taxation of the penalty.

13.158 This communication between the ACNC Commissioner and the Commissioner of Taxation will allow the Commissioner of Taxation to be fully aware of any debts that he or she is to pursue in relation to this Division. Further information about communication between the ACNC Commissioner and the Commissioner of Taxation is to be set out in the Memorandum of Understanding between the two Commissioners.

13.159 The Commissioner of Taxation is responsible for the debt for the purposes of the *Financial Management and Accountability Act 1997*. [Subsection 175-70(2) note 1 and 2]

13.160 The Commissioner of Taxation will treat the debt as a primary tax debt, in the same way that any debt arising from a taxation law would be treated.

13.161 Upon request in writing by the ACNC Commissioner, the Commissioner of Taxation must notify the ACNC Commissioner of any action taken by the Commissioner of Taxation to recover a debt attributable to the penalty. [Subsection 175-70(5)]

13.162 Allowing the Commissioner of Taxation to collect ACNC debts ensures cost effectiveness and efficiency for the Government and for the

entity, ensuring all its debts are centralised and managed by one government agency.

## Obligations, liabilities and offences

### Overview

13.163 If an entity is subject to an obligation or liability, or commits an offence, certain entities that are responsible for managing the entity may also be subject to the obligation or liability, or commit the offence, in specific situations. *[Division 180]*

13.164 This ensures that certain responsible entities are accountable for fulfilling the obligations contained in the Bill. This is particularly important in the case of entities that do not have legal personality, such as unincorporated associations and trusts, as they cannot be sued or penalised.

13.165 In contrast, a body corporate does have separate legal personality, and can be sued or penalised. For this reason, the Bill sets out a more streamlined and targeted framework for attaching personal liability to directors of a body corporate. The directors of the body corporate will *not* be made personally liable for any offences contained in the Bill. Furthermore, the directors will only be personally liable for the liabilities of the body corporate in certain limited cases, for example, if there is a deliberate act involving dishonesty on their part.

13.166 This regime ensures that certain responsible entities are accountable for making sure that the entity complies with the law, whilst protecting those responsible entities by providing that they will only be subject to certain liabilities or offences in specified cases, for example, if they act dishonestly.

### Obligations, liabilities and offences

13.167 The Bill expressly identifies those requirements that result in an offence. For example, a failure to comply with a direction from the ACNC Commissioner would result in an offence *[Section 85-30]*.

13.168 In addition to offences other liabilities can arise, for example, as a result of administrative penalties. A liability is an amount payable under the Act, which can only arise where there has been a contravention of the Act. For example, a failure to lodge an annual report on time, which may

result in the imposition of an administrative penalty [Section 175-35]. The administrative penalty regime was explained earlier in this Chapter.

13.169 An obligation includes any requirement contained in the Bill, for example, the obligation to keep financial records. Irrespective of whether a liability or offence arises, the Bill makes it clear that certain responsible entities are responsible for fulfilling the obligations contained in the Bill. However, in some cases, the Bill provides greater protection for responsible entities in respect of liabilities and offences that apply to them by requiring that specific fault elements be present, as noted above.

13.170 An obligation can continue to apply to certain responsible entities, even if the entity is not subject to an offence provision or another type of liability. For example, if an unincorporated association fails to keep financial records, the association will commit an offence under the Bill. In this case, the members of the committee of management will not be taken to have personally committed the offence if they did not aid, abet, counsel or procure the act or omission, or if they were not knowingly concerned in, or a party to, the act or omission. However, they will be subject to the obligation to keep financial records.

13.171 Imposing these obligations, offences and liabilities on certain responsible entities does not reduce or negate the obligations, offences and liabilities applying to the entity itself.

13.172 The obligations, offences and liabilities of entities are not imposed on receivers, administrators or liquidators of entities under the Bill.

## **Unincorporated associations and bodies of persons**

### ***Obligations***

13.173 An obligation that is imposed on an unincorporated association or body of persons is also imposed on each member of the committee of management at the time the obligation arose. [Subsection 180-5(1)]

13.174 As the unincorporated association or body of persons has no separate legal personality, these obligations need to be placed on the members of the committee of management to ensure that the association or body complies with the law.

### ***Liabilities***

13.175 A liability that is payable under the Bill (that is, a liability that results from a contravention of the Bill) by an unincorporated association or body of persons is payable by each member of the committee of

management at the time the amount became payable [*Subsection 180-5(2)*]. This is consistent with the existing position in respect of unincorporated associations and bodies of persons, as they have no separate legal personality, and therefore, the debts of the association or body are payable by the members.

13.176 The members of the committee are jointly and severally liable to pay the amount. [*subsection 180-5(3)*] This ensures that the ACNC Commissioner could sue any of them, or could sue them as a group.

13.177 If one or more members pay the amount, they have a right of indemnity, subrogation and contribution against other members of the committee. [*Section 180-35*]

### *Offences*

13.178 Any offence that is committed by an unincorporated association or body of persons under the Bill is taken to have been committed by each member that was a member of the committee of management at the time the association or body committed the offence, only if the member:

- aided, abetted, counselled or procured the relevant act or omission; or
- was in any way knowingly concerned in, or a party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the director).

[*Subsections 180-10(1) and (2)*]

13.179 There are two defences available to a member of the committee of management in respect of the offence provisions.

13.180 An offence will not apply to the member of the committee of management if, because of illness or for some other good reason, it would have been unreasonable to expect the member to take part, and the member did not take part, in the management of the association or body at any time when the offence was committed. [*Subsections 180-10(3) and 180-15(1)*]

13.181 An offence will also not apply to the member of the committee of management if the member took all reasonable steps to ensure that the association or body did not commit the offence, or there were no such steps the member could have taken [*subsection 180-15(2)*]. For example, if a member of the committee was out-voted at a board meeting on a particular resolution to do an act that would lead to a breach of the Bill, it is likely that they could rely on this defence.

13.182 In determining what are reasonable steps, it is necessary to have regard to when, and for how long, the member was a member of the management of committee, and all other relevant circumstances.

*[Subsection 180-15(3)]*

13.183 A defendant bears the evidential burden to prove the matters in respect of these defences.

13.184 Under subsection 13.3(3) of the *Criminal Code*, ‘evidential burden’ means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

13.185 In the context of these defences, this would mean that a member seeking to rely on one of the defences will need to point to relevant evidence, including evidence of their illness or any reasonable steps taken by them.

13.186 This is consistent with the Attorney-General Department’s publication entitled *A guide to framing Commonwealth offences, infringement notices and enforcement power* where it states that an evidential burden of proof should generally apply to a defence where there is an offence-specific defence. In these situations, the defendant is in the best position to provide evidence justifying why they triggered the offence-specific defence.

13.187 In this case, placing the evidential burden on the defendant is justified as they will be able to point to any relevant evidence relating to their illness and the extent of any participation in the management of the association or body, or any reasonable steps taken by them.

13.188 Despite the evidential burden resting on the defendant, the prosecution retains the ‘legal burden’ of proof and is required to prove each element of an offence beyond reasonable doubt, consistent with the requirements of Article 14 of the *International Covenant on Civil and Political Rights*.

## **Trusts**

### ***Obligations***

13.189 An obligation that is imposed on a trust is also imposed on each trustee at the time the obligation arose, provided the trustee is not a corporate trustee.

13.190 If the trustee is a corporate trustee, the obligation is imposed on each director of the corporate trustee, as well as the trustee, at the time the obligation arose. *[Subsection 180-20(1)]*



### ***Liabilities***

#### *Trustee is not a corporate trustee*

13.191 A liability that is payable under the Bill (that is, a liability that results from a contravention of the Bill) by a trust is payable by each trustee at the time the amount became payable, provided the trustee is not a corporate trustee. [Subsection 180-20(2)]

13.192 The trustees are jointly and severally liable to pay the amount [Subsection 180-20(4)]. This ensures that the ACNC Commissioner could sue any of them, or could sue them as a group. If one or more trustees pay the amount, they have a right of indemnity, subrogation and contribution against any other trustees [Section 180-35].

#### *Trustee is a corporate trustee*

13.193 If the trustee, or one or more of the trustees, is a corporate trustee, the liability is payable by the trustee and each director of the corporate trustee at the time the obligation arose only if there is a deliberate act or omission of the director involving dishonesty, gross negligence or recklessness. [Subsection 180-20(3)]

### ***Joint and several liability***

13.194 The trustees, and any directors of a corporate trustee, are jointly and severally liable to pay the amount [subsection 180-20(4)]. This ensures that the ACNC Commissioner could sue any of them, or could sue them as a group. If one or more trustees or directors pay the amount, they have a right of indemnity, subrogation and contribution against any other trustees or directors. [Section 180-35]

### ***Commissioner of Taxation has direct access to trust assets***

13.195 In suing for amounts owed by a trust, the Commissioner of Taxation is not limited to recovering against the personal assets of the trustees or directors of the corporate trustee. He or she can also take action directly against the trust assets. [Section 180-20(5)]

### ***Offences***

13.196 Any offence that is committed under the Bill by a trust, is taken to have been committed by each trustee at the time the trust committed the offence. [Section 180-25]

#### *Trustee is a corporate trustee*

13.197 Directors of a corporate trustee are *not* subject to an offence provision contained in the Bill that applies to a trust.

## **Bodies corporate**

### *Liabilities*

13.198 A liability that is payable under the Bill (that is, a liability that results from a contravention of the Bill) by a registered body corporate is also payable by each director of the body corporate at the time the amount became payable, only if the liability arose because of a deliberate act or omission of the director involving dishonesty, gross negligence or recklessness. [*Section 180-30*]

13.199 The directors and the body corporate are jointly and severally liable to pay the amount. [*subsection 180-30(3)*] This ensures that the ACNC Commissioner could sue any of them, or could sue them as a group. If one or more directors pay the amount, they have a right of indemnity, subrogation and contribution against any other directors [*Section 180-35*].

### *Offences*

13.200 Directors of a body corporate are *not* subject to an offence provision contained in the Bill that applies to the body corporate.

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## **Chapter 14**

### ***Transitional provisions***

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#### **Outline of chapter**

- 14.1 This Chapter outlines the transitional arrangements for:
- registration;
  - reporting;
  - the Australian Charities and Not-for-profits (ACN) Register;
  - Australian Charities and Not-for-profits Commission (ACNC) annual report;
  - the Advisory Board;
  - endorsement timing; and
  - the disclosure of protected taxation information to the ACNC.

14.2 References in this Chapter to the ‘Consequential and Transitional Bill’ are references to the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 (Consequential and Transitional Bill). All other references to ‘the Bill’ are references to the main ACNC Bill.

#### **Summary of new law**

14.3 This Chapter explains the transitional arrangements that apply to various aspects of the Bill under the Consequential and Transitional Bill.

14.4 These transitional arrangements allow entities time to transition effectively from endorsement under the taxation law to the new arrangements under the Bill. The transitional arrangements also facilitate additional time for the ACNC to perform its powers and functions under the Bill.

## **Detailed explanation of new law**

### **Registration**

14.5 Transitional registration arrangements will apply that will enable certain entities endorsed or eligible under Division 50 of the *Income Tax Assessment Act 1997* (ITAA 1997) to be registered entities under the Bill.

14.6 However, once transitioned, all registered entities are then subject to the ongoing requirements of the ACNC in order to remain registered and charities that are not registered with the ACNC are not eligible to continue to receive Commonwealth tax concessions from 1 October 2012. For more information on Registration see Chapter 3 — Registration.

#### *Charities and charity sub-types*

14.7 The entity types described below are automatically registered with the ACNC on 1 October 2012 through the transitional registration arrangements. They do not need to do anything else in order to become registered.

#### *Charities*

14.8 Under these transitional registration arrangements, entities that are endorsed by the Australian Taxation Office (ATO) prior to the commencement of the ACNC are taken to be registered entities under the ACNC on the commencement of the ACNC, under the type – charity. *[Schedule 1, item 2 of the Consequential and Transitional Bill]*

14.9 For the purposes of the transitional registration arrangements, ‘charities’ are those entities that are endorsed by the ATO as charities that are income tax exempt under table items 1.1 and 1.5 to 1.5B in section 50-5 of the ITAA 1997. This includes all entities which are charitable institutions, funds or trusts endorsed by the Commissioner of Taxation.

14.10 Registration as a subtype under the Bill is not automatic, but if an entity meets the requirements, it can register as one or more subtype at a later date.

#### *Health promotion charities*

14.11 Under these transitional registration arrangements, entities that are currently endorsed as health promotion charities are taken to be registered entities under the ACNC on the commencement of the ACNC as entities with a type — charity and a subtype — entity whose principal

activity is to promote the prevention or the control of diseases in human beings. *[Schedule 1, item 3 of the Consequential and Transitional Bill]*

14.12 For the purposes of the transitional registration arrangements, ‘health promotion charities’ are those entities that are;

- income tax exempt under table item 1.1; and
- endorsed under table item 1.1.6 of subsection 30-20(1) of the ITAA 1997; or
- have access to fringe benefits tax (FBT) concessions under section 57A of the FBTAA)

#### **Example 14.1**

Yellow Lines is a health promotion charity registered with the ATO and eligible for income tax exemptions under the ITAA 1997 and FBT concessions under the FBTAA. On 1 October 2012 Yellow Lines is automatically registered with the ACNC under the type — charity and the subtype — institution whose principal purpose is to promote the prevention or the control of diseases in human beings. Yellow Lines does not need to do anything in order to be registered on 1 October 2012.

#### *Public benevolent institutions*

14.13 Entities which are currently endorsed as public benevolent institutions (PBIs) are taken to be registered entities under the ACNC on the commencement of the ACNC, as entities with a type – charity and a subtype – public benevolent institution. *[Schedule 1, item 4 of the Consequential and Transitional Bill]*

14.14 For the purposes of the transitional registration arrangements, ‘PBIs’ are those entities that are;

- income tax exempt entities under table item 1.1; and
- endorsed under table item 4.1.1 of subsection 30-45(1) of the ITAA 1997; or
- have access to fringe benefits tax (FBT) concessions under section 57A of the FBTAA.

#### *Religious institutions*

14.15 Any entities which may be self-assessing as income tax-exempt under item 1.2 in the table in section 50-5 of the ITAA 1997, and which

are not endorsed as a charity, a PBI or a health promotion charity are also transitioned across to the ACNC upon its commencement.

14.16 Entities that fall under this category must notify the ACNC Commissioner of their type, and any subtype(s), in the approved form and within 12 months of the commencement of the ACNC. *[Schedule 1, item 6 of the Consequential and Transitional Bill]*

#### ***Opting out of registration***

14.17 Registration with the ACNC is voluntary. As such, charities, PBIs and health promotion charities that are automatically registered upon the commencement of the ACNC may opt-out of registration if they wish to.

14.18 Religious institutions do not need to opt-out of registration as they are not endorsed by the Commissioner of Taxation and are therefore self-assessing as tax exempt. They will be required to notify the ACNC of their intention to be registered under the transitional registration arrangements.

14.19 If an entity opts-out of registration with the ACNC they lose ongoing access to Commonwealth tax concessions, exemptions and other benefits.

14.20 To opt-out of registration with the ACNC, charities must provide advice, in the approved form, to the ACNC Commissioner by 1 March 2013. *[Schedule 1, subitem 5(1) of the Consequential and Transitional Bill]*

14.21 If an entity decides to opt-out of registration, they are taken to have never been automatically registered with the ACNC. *[Schedule 1, subitem 5(2) of the Consequential and Transitional Bill]*

14.22 An entity that opts-out of registration is taken to not to have been registered since 1 October 2012, and taken to have been dis-endorsed by the Commissioner of Taxation from 30 September 2012. *[Schedule 1, subitem 5(3) of the Consequential and Transitional Bill]*

14.23 As such, they lose access to tax concessions from the commencement of the ACNC, even if they do not provide advice to the ACNC until a later date.

#### **Example 14.2**

Tea and Sympathy is a PBI endorsed by the ATO to receive income tax exemptions and FBT concessions. Tea and Sympathy is automatically registered with the ACNC upon its commencement on 1 October 2012.

Tea and Sympathy does not wish to be registered with the ACNC. Tea and Sympathy provides advice to the ACNC, in the approved form, before 1 March 2013 that it wishes to opt-out of registration. Tea and Sympathy is taken to have never been registered with the ACNC.

Tea and Sympathy loses its PBI status and endorsement from 1 October 2012. It also loses ongoing access to Commonwealth tax concessions from 1 October 2012.

### **Example 14.3**

The South Fund, a charity, is automatically transitioned to a registered entity under the ACNC on 1 October 2012. However, the South Fund decides to opt-out of registration. They provide advice in the approved form to the ACNC Commissioner on 1 December 2012.

During the period 1 October to 1 December 2012 the Fund receives \$1,000 in tax-free income. The South Fund is taken to have never been registered with the ACNC, and dis-endorsed by the Commissioner of Taxation from 30 September 2012 and may be liable for tax on the \$1,000 of income.

## **The ACN Register**

14.24 The ACN Register is an electronic database made available to the public which contains information about entities registered with the ACNC. For more information on the ACN Register see Chapter 4 — The ACN Register.

14.25 However, the ACNC Commissioner will not have all the information detailed in Division 20 of the Bill in the first 15 months from the commencement of the ACNC.

14.26 This is because registered entities are not required to provide information such as their first annual information statements and financial reports until sometime after the commencement of the ACNC and the existing ATO information may not be disclosed to the ACNC (under the transitional secrecy arrangements discussed below) straight away.

14.27 In recognition of this, the transitional ACN Register provision allows the ACNC Commissioner to maintain an incomplete ACN Register in the first 15 months from the commencement of the ACNC.  
*[Schedule 1, item 7 of the Consequential and Transitional Bill]*

14.28 During the period from 1 October 2012 to 1 December 2013, the transitional ACN Register provision operates so that Division 20 of the

Bill does not apply to information or documents that the ACNC Commissioner does not possess. *[Schedule 1, item 7 of the Consequential and Transitional Bill]*

14.29 The ACNC Commissioner must only publish the information to which he or she has access to in the period between 1 October 2012 and 1 December 2013.

## Reporting

### *Statements, reports and other documents given to other Australian government entities*

14.30 The ACNC Commissioner may treat a statement, report or other document given under an Australian law to an Australian government agency (other than the Commissioner) by a registered entity (whether before or after the entity is registered) as being:

- an information statement for a financial year given to the Commissioner under the ACNC Bill; or
- the reports mentioned in section 60-10 of the ACNC Bill for a financial year given to the Commissioner in accordance with Subdivision 60-C (Annual financial reports) or 60-D of the ACNC Bill.

*[Schedule 1, subitem 10(4) of the Consequential and Transitional Bill]*

14.31 The purpose of this provision is to enable the ACNC Commissioner to address potential reporting duplication during the process of establishing the ACNC as a one-stop shop regulator.

14.32 The non-government schools sector and charitable Indigenous corporations would be examples of classes of entity that are intended to benefit from the exercise of the discretion of the ACNC Commissioner.

14.33 In determining whether to treat a statement, report or other document as satisfying an entity's reporting obligations under the ACNC Bill, the Commissioner must have regard to the following matters:

- what access the Commissioner has to the statement, report or other document;
- whether the statement, report or other document contains:
  - the information required under the ACNC Bill to be in the information statement or reports; or



- other information that relates to, or has the purpose of, enabling the same recognised assessment activities to be carried out in relation to registered entities;
  - the processes that have been undertaken to verify the information contained in the statement, report or other document. This may include, for example, whether the report, statement or document has been subject to an audit or review.
- 14.34 This applies to statements, reports or other documents in respect of:
- the 2012-13 financial year; and
  - the 2013-14 financial year; and
  - the 2014-15 financial year; and
  - a later financial year prescribed by the regulations.

*[Schedule 1, Subitem 10 of the Consequential and Transitional Bill]*

14.35 The requirements relating to substituted accounting periods apply (see detailed explanation of substituted accounting periods below).

#### ***Annual Information Statements***

14.36 All registered entities must complete an annual information statement for the first financial year of the ACNC, and later financial years. *[Schedule 1, subitem 8(1) of the Consequential and Transitional Bill]*

14.37 The first annual information statement will need to be prepared for the financial year commencing 1 July 2012 to 30 June 2013, and will need to be lodged with the ACNC by 31 December 2013.

14.38 If an entity adopts a substituted accounting period (SAP) under Subdivision 60-F, then the annual information statement will be due six months after the end of the SAP that commences in the 2012-13 financial year. *[Schedule 1, subitem 8(2) of the Consequential and Transitional Bill]*

#### ***Financial reports***

14.39 Unlike the annual information statement, financial reporting is not compulsory for the first financial year. The annual financial report requirements of the ACNC Bill apply to the 2013-14 financial year and later financial years. *[Schedule 1, subitem 9(1) of the Consequential and Transitional Bill]*

14.40 Financial reporting is compulsory for all medium and large registered entities from 1 July 2013. This will mean that the first financial report will be due by 31 December 2014, in respect of the 2013-14 financial year.

14.41 If an entity adopts a SAP under Subdivision 60-F, then the financial report will be due six months after the end of the substituted accounting period that commences in the 2013-14 financial year. *[Schedule 1, note in subitem 9(1) of the Consequential and Transitional Bill]*

#### ***Voluntary financial reports***

14.42 Entities that wish to complete a financial report for the 2012-13 financial year may do so voluntarily and lodge it with their annual information statement.

14.43 If an entity wishes to voluntarily complete a financial report for the 2012-13 financial year, they do not need to comply with the rules set out in the Bill about the content of financial reports, audit requirements or due dates for lodging such reports. *[Schedule 1, subitems 9(2) and 9(3) of the Consequential and Transitional Bill]*

14.44 If an entity adopts a substituted accounting period under Subdivision 60-F, then the financial report will be due six months after the end of the substituted accounting period that commences. *[Schedule 1, note in subitem 9(4) of the Consequential and Transitional Bill]*

#### ***Substituted accounting periods***

14.45 The transitional arrangements allow entities which currently report under an Australian law on a substituted accounting periods (SAP) basis to continue to report to the ACNC on the basis of the SAP. *[Schedule 1, item 11 of the Consequential and Transitional Bill]*

14.46 These arrangements are applicable to all entities that are or were required under an Australian law to prepare a report (any form of financial reports) for a period of 12 months that ended on a substituted end day during the 2012-13 financial year. *[Schedule 1, subitem 11(1) of the Consequential and Transitional Bill]*

14.47 Registered entities in this situation are taken to have been approved by the ACNC Commissioner to have a SAP.

14.48 The registered entity must advise the ACNC Commissioner of their reporting period, in the approved form, within six months of the commencement of the ACNC to allow the ACNC Commissioner to update their records so they know which entities operate on an existing SAP. *[Schedule 1, subitem 11(2) of the Consequential and Transitional Bill]*

14.49 Financial reports for entities with SAPs are due six months after the end of the first SAP that substitutes for the 2013-14 financial year.

14.50 Registered entities with a SAP can also voluntarily lodge financial reports before this time. If a registered entity with a SAP reports voluntarily before financial reports are mandatory they need not comply with the rules set out in the Bill about the content of financial reports, audit requirements or due dates for lodging such reports.  
*[Schedule 1, subitems 9(2), (3) and (4) of the Consequential and Transitional Bill]*

#### **Example 14.4**

Towns Girls School reports to the Australian Curriculum, Assessment and Reporting Authority at the end of each calendar year. Upon the commencement of the ACNC on 1 October 2012, Towns Girls School is automatically approved by the ACNC Commissioner to continue reporting on a calendar year basis. Towns Girl School notifies the ACNC Commissioner of their SAP on 1 January 2013.

Towns Girls School's first SAP after 1 July 2013 begins on 1 January 2014 and ends on 31 December 2014. Towns Girls School's first report is due six months after 31 December 2014 on 30 June 2015.

14.51 These arrangements allow for registered entities to continue to report to the ACNC over the same period as they previously reported to a government body, without needing to apply to the ACNC Commissioner for approval of a SAP. This minimises the compliance burden on registered entities.

14.52 Entities which are or were not required under an Australian law to prepare a financial report in the previous financial year are not automatically approved for a SAP.

14.53 However, such an entity may apply to the ACNC Commissioner, in the approved form, for a SAP (in lieu of the financial year) by the time set down by the ACNC Commissioner

#### **ACNC Annual report**

14.54 As the ACNC commences part way through a financial year, on 1 October 2012, the first annual report produced by the ACNC Commissioner will not relate to an entire financial year.

14.55 Consequently, the first annual report will be for the period commencing 1 October 2012, and finishing on 30 June 2013.  
*[Schedule 1, item 12 of the Consequential and Transitional Bill]*

### **Advisory Board**

14.56 The Advisory Board must meet four times each financial year beginning in the 2013-14 financial year.

14.57 However, under the Consequential and Transitional Bill, the Advisory Board is not required to meet four times during the period 1 October 2012 to 30 June 2013, although the Chair may still convene meetings during this period. [*Schedule 1, item 13 of the Consequential and Transitional Bill*]

### **Endorsement timing issues**

14.58 The ATO is responsible for endorsing entities as charities (including as PBIs and health promotion charities) until 30 September 2012.

14.59 The ACNC is responsible for registering entities as charities (including PBIs and health promotion charities) from 1 October 2012.

14.60 Entities that have applied to the ATO for endorsement as a charity (including as a PBI and health promotion charity) prior to the commencement of the ACNC, but have not yet had their application finalised by 1 October 2012, continue to have their application finalised by the ATO.

14.61 If such an entity then receives endorsement by the ATO under the relevant provisions, they are taken to be a registered entity under the ACNC upon its commencement under the transitional registration provisions.

#### **Example 14.5**

The JRC Foundation applies to the ATO for endorsement as a charity on 10 September 2012. The ATO approves the JRC Foundation's application and endorses it as a charity on 20 September 2012.

The JRC Foundation is automatically registered with the ACNC on 1 October 2012.

#### **Example 14.6**

Following on from the above example, the ATO approves the JRC Foundation's application and endorses it as a charity on 15 October 2012.

The ATO backdates the JRC Foundation's endorsement as a charity to the day that it applied to the ATO. The JRC Foundation is taken to have been a tax endorsed charity since 10 September 2012. As such, the JRC Foundation is taken to have automatically transitioned to the ACNC on 1 October 2012.

The JRC Foundation is registered with the ACNC and does not need to do anything further.

14.62 Entities that have applied to the ATO for endorsement as a charity (including as a PBI or health promotion charity), but have had their application rejected by the ATO prior to the commencement of the ACNC, and wish to appeal that decision, must appeal under the tax law review and appeal rules against the decision of the Commissioner of Taxation.

**Example 14.7**

MOLA applies to the ATO for endorsement as a charity on 10 September 2012. The ATO does not approve MOLA's application and notifies the entity of this on 20 September 2012.

MOLA wishes to appeal the decision. MOLA must appeal the Commissioner of Taxation's decision under the tax law review and appeal rules.

MOLA could also choose to abandon an appeals process and apply to be registered with the ACNC.

14.63 Any review or appeal that commenced with the ATO prior to the commencement of the ACNC remains with the ATO for determination according to the tax law review and appeal rules.

**Example 14.8**

BendIt applied to the ATO for endorsement as a charity on 15 August 2012. The ATO rejects their application and notifies BendIt on 5 September 2012. BendIt appeals the decision. On 5 October 2012 the Administrative Appeals Tribunal (AAT) decides that BendIt should have been endorsed as a charity by the Commissioner of Taxation.

The AAT decides that BendIt should have been endorsed by the Commissioner of Taxation on 5 September 2012. BendIt is taken to have been automatically registered with the ACNC on 1 October 2012.

14.64 The application information provided by entities that apply to the ACNC (on or after 1 October 2012) to be a registered entity under any

subtype category, and seek a backdated registration and endorsement prior to 1 October 2012, is to be passed to the ATO for consideration of the period prior to 1 October 2012.

#### **Example 14.9**

LooLA applies to the ACNC to be registered as a charity on 15 October 2012. LooLA seeks backdated registration to 15 September 2012. The ACNC Commissioner of the ACNC determines the organisation's charitable status from 1 October 2012. The ACNC passes LooLA's application information to the ATO to allow the ATO to determine LooLA's eligibility to be endorsed as a charity for the period 15 September 2012 to 30 September 2012.

#### **Example 14.10**

Following on from the example above the ACNC determines that LooLA is entitled to register with the ACNC from 1 October 2012. However, the ATO determines that LooLA was not eligible to be endorsed as a charity for the period 15 September 2012 to 30 September 2012.

LooLA may appeal the Commissioner of Taxation's decision in accordance with the tax law review and appeal laws.

### **Disclosure of protected taxation information to the ACNC**

14.65 In order to facilitate a smooth transition for the ACNC, transitional secrecy provisions in the Consequential and Transitional Bill enable a taxation officer to make a record or disclose to the ACNC Commissioner protected taxation information for the purpose of the ACNC Commissioner performing powers and functions or exercising powers in relation to the ACN Register. *[Schedule 1, item 14 of the Consequential and Transitional Bill]*

14.66 However, the record or disclosure of protected taxation information can only be made up until six months from the start of the commencement day. *[Schedule 1, paragraph 14(d) of the Consequential and Transitional Bill]*

14.67 This temporary exception to the operation of section 355-25 in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) enables the ACNC to populate the ACN Register with information about existing charities that were previously endorsed by the ATO prior to the commencement day.

14.68 This ensures that as the ACNC takes over the function of registering charities, it is able to publish information previously provided to the ATO on the ACN Register subject to the ACNC secrecy framework and subject to the restrictions on the disclosure of personal information under the ACNC Bill.

14.69 This allows the ACNC to be fully functional from the commencement date and remove the need for the ACNC to contact all of the existing charities to provide information which the ATO already has available.

14.70 Whilst there are consequential amendments (as part of the Consequential and Transitional Bill) that facilitate the disclosure of protected taxation information under Division 355 in Schedule 1 to the TAA 1953 to the ACNC for the purpose of administering the Bill, these transitional secrecy provisions are necessary for a different purpose.

14.71 Unlike disclosure under the consequential amendments (wherein the information disclosed retains its character as 'protected taxation information' and is subject to the on-disclosure provisions in Division 355 in Schedule 1 to the TAA 1953, the information disclosed under these transitional secrecy provisions will become publicly available as they are published on the ACN Register and will then become 'protected ACNC information' and be subject to the secrecy framework within this Bill.

14.72 However, the transitional secrecy provisions do not extend to the disclosure of protected taxation information that is outside of the scope of the type of information required under section 40-5 of the Bill.

14.73 Moving forward, should the ACNC require (for purposes under this Bill) tax specific information or any other information not covered within transitional secrecy arrangements, it will need to request disclosure of that information from the Commissioner of Taxation in accordance with the proposed consequential amendment to Division 355 in Schedule 1 to the TAA 1953 allowing for disclosure of protected taxation information to the ACNC for the purposes of administering the Bill.

### **Five year review**

14.74 The ACNC Consequential and Transitional Bill provides for a statutory review of the ACNC legislation. This ensures that five years after the commencement of the Bill, the Minister must appoint a person to review the operation of the ACNC Bill and the ACNC Consequential and Transitional Bill. The review will focus on the operation of the legislation and the ACNC and how the objects of the ACNC Bill have been achieved.

The reviewer must provide a report and present the report to the Parliament. *[Schedule 1, item 15]*



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## **Chapter 15**

### **Consequential amendments**

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#### **Outline of chapter**

15.1 This Chapter explains:

- the rationale behind the consequential legislative amendments; and
- the commencement timing of the consequential legislative amendments.

15.2 This Chapter also identifies the Commonwealth Acts which will be amended by the Australian Charities and Not-for-profits Commission Consequential and Transitional Bill (the ACNC Consequential and Transitional Bill).

#### **Summary of new law**

15.3 The Australian Charities and Not-for-profits Commission Bill (ACNC Bill) will create a ‘one-stop shop’ for eligible NFP entities that are seeking access to tax concessions and, consistent with the Government’s announcements, to make Australian Charities and Not-for-profits Commission (ACNC) registration a precondition where charities seek access to Australian Government exemptions, concessions or benefits available to charities.

15.4 To give effect to this policy intent a range of consequential legislative amendments are required to establish the ACNC as the central regulatory body for the NFP sector.

15.5 The amendments to Commonwealth legislation alter references to ‘charity’, ‘charities’, ‘charitable entities’ and like terms so that concessions, exemptions and benefits that are available to charities are now available only to charities registered with the ACNC.

15.6 Minor amendments were also made to Commonwealth Acts that provide concessions, exemptions and benefits to not-for-profits (NFPs). This was done to ensure that benefits earmarked for NFPs are only accessed by charities which are registered.

15.7 Finally, consequential legislative amendments were also made in order to minimise any regulatory duplication which may exist at the Commonwealth level; and to cater for the establishment and integration of the ACNC into the Commonwealth Government.

## **Detailed explanation of new law**

15.8 As announced during the 2011-12 Budget, the ACNC will be a 'one-stop shop' regulator for the NFP sector. The ACNC's initial responsibilities will include:

- determining the legal status of entities seeking charitable status, including public benevolent institution (PBI) status, on behalf of all Commonwealth agencies;
- registering entities under their charitable status; and
- administering a new system of smarter regulation which will be proportional to size and risk, and minimise any regulatory duplication.

15.9 Consequential legislative amendments are required to enable the ACNC to determine the charitable status of entities on behalf of all Commonwealth agencies; to minimise any regulatory duplication which may exist at the Commonwealth level; and to cater for the establishment and integration of the ACNC into Commonwealth Government.

15.10 The ACNC Consequential and Transitional Bill also contains a set of commencement provisions which ensures that the consequential amendments achieve intended outcomes.

15.11 The commencement provisions takes into account amendments which results from several measures still before Parliament.

15.12 Amendments contained in Schedule 2 to Schedule 3 to the ACNC Consequential and Transitional Bill will become operative once the ACNC Bill commences. These amendments generally change endorsement requirements for Commonwealth concessions, exemption and benefits to include ACNC registration as a precondition.

15.13 Amendments in Schedule 4 of the ACNC Consequential and Transitional Bill will become operative once the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 commences. These amendments are used to consolidate the terms 'funds', 'trusts' and 'institution' into 'entity', standardise certain conditions for

access to tax concessions, and apply a consistent definition for the term 'Not-for-profit' across Commonwealth legislation.

15.14 The form of some of the amendments contained in Part 6 in Schedule 2 to the ACNC Consequential and Transitional Bill will hinge on the commencement of the amendments to the *Customs Tariff Amendment Act 1995*.

15.15 Timing elements must be kept in mind when working through the consequential amendments, as many amendments are contingent on other reforms commencing. For this reason it has been necessary to carefully sequence the amendments to certain Acts.

15.16 For example, amendments in Division 2 of Part 2 in Schedule 4 to the ACNC Consequential and Transitional Bill make changes to the amendments which are made to Part 7 of Schedule 2 of the ACNC Consequential and Transitional Bill. This is required because the latter changes can only be made once the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 commences.

### **Determining charitable status on behalf of all Commonwealth agencies**

15.17 Charities receive concessions, exemptions and benefits from the Commonwealth Government in recognition of the public benefit they provide. Commonwealth concessions, exemptions and benefits usually appear in Commonwealth Acts.

15.18 To access the numerous concessions, exemptions and benefits, entities have to satisfy the Commonwealth agency which administers these Acts that they are charities within the common law definition of the term.

15.19 Providing the ACNC with a central registration function will ensure that entities have to apply for charitable status on a single occasion. This will ultimately reduce the compliance cost and regulatory burden faced by NFP entities, and the administrative burden on the Commonwealth Government.

15.20 To ensure the ACNC's registration applies across all Commonwealth agencies, consequential amendments to Commonwealth Acts which provide charities with concessions, exemptions and benefits were made. A large share of consequential amendments included in the ACNC Consequential and Transitional Bill require charities to be registered by the ACNC under their charitable status, as a precondition to accessing the concessions, exemptions and benefits.

15.21 The amendments to Division 30 of the *Income Tax Assessment Act 1997*, Division 50 of the *Income Tax Assessment Act 1997*, to the *Competition and Consumer Act 2010* and the *Do Not Call Register Act 2006* are all examples of this type of amendment. [*Schedule 2, Part 2, and Part 7*]

15.22 In specific cases where Commonwealth concessions, exemptions and benefits are earmarked for a particular subtype of charity, amendments require ACNC registration as a particular subtype.

15.23 The amendments to the *Fringe Benefits Tax Assessment Act 1986*, the *A New Tax System (Goods and Services Tax) Act 1999*, and certain item of Division 30 of the *Income Tax Assessment Act 1997* are all examples of this type of amendment. [*Schedule 2, Parts 1, 3, 4 and 6*]

15.24 Chapter 2 of the main ACNC Bill includes a registration table which describes the range of charitable subtypes. (Further information is provided in Chapter 3 of the explanatory memorandum)

15.25 The ACNC Consequential and Transitional Bill also makes further changes to the structure of Division 30 of the *Income Tax Assessment Act 1997* which sets out the endorsement requirements for entities wishing to be deductible gift recipients. [*Schedule 2, Part 1*]

15.26 To make conditions associated with endorsement clearer, special conditions are now divided into two columns, one of the columns specifying the conditions the entity has to satisfy to be endorsed, with the second setting out the conditions associated with the gift.

15.27 The tables listing the entities that have been specifically listed as deductible gift recipients have not been changed.

15.28 The ACNC Consequential and Transitional Bill also clarifies that endorsement under most of the deductible gift recipient categories in Division 30 of the *Income Tax Assessment Act 1997* are limited to charities.

15.29 Currently, some of the deductible gift recipient categories do not explicitly require an entity to be a charity prior to being endorsed as a deductible gift recipient. However, the Australia Taxation Office's (ATO's) administrative practice and interpretation of the law would generally require entities to be charitable prior to receiving endorsement.

15.30 To be covered by a deductible gift recipient category an entity would have to have a purpose which is conducive to the public benefit and be a NFP entity. In all cases the purpose will be charitable and therefore the entity would meet the common law definition of charity, unless it is a

government entity. While being charitable is not an explicit condition of endorsement as a deductible gift recipient, the deductible gift recipient categories are generally subsets of charity which imply a limitation of endorsement to only charities.

15.31 For example, in item 1.1.1 of the Division, ‘public hospitals’ are not legally required to be charities. However, to be endorsed under this category hospitals would need to be a NFP entity and, given the nature of the hospital’s activities, would have a purpose which is beneficial to the community. A NFP entity with a purpose which is beneficial to the community would meet the common law definition of charity.

15.32 The ATO’s database shows that the clarification will not affect existing deductible gift recipients. However, should the database not be up to date and some entities are not charities, they will have a 12 month transition period to ensure they meet the requirement to be a charity and endorsed under DGR categories.

15.33 The Consequential and Transitional Bill also clarifies that in certain cases special conditions and registration requirements would be required to be met by the entity that is operating a public fund.

15.34 This occurs for example in items 9.1.1 and 9.1.2 in subsection 30-80(1) of the *Income Tax Assessment Act 1997*, and items 12.1.2, 12.1.3, 12.1.4 and 12.1.5 in subsection 30-100(1) of the *Income Tax Assessment Act 1997*.

15.35 These amendments ensure that where public funds are set up by registered charities, for example to provide resources for disaster relief, the public fund does not have to go through a registration process. The amendments also ensure consistency with the ATO’s current administrative practice.

15.36 The ACNC Consequential and Transitional Bill also make changes to Division 50 of the *Income Tax Assessment Act 1997*. The Division provides certain entities with access to income tax exemption, usually in recognition of the public benefit these entities provide.

15.37 The change amalgamates the ‘religious institution’ exemption into the broader charitable exemption. The ‘religious institution’ exemption is a relic of history made redundant after the *Extension of Charitable Purpose Act 2004*.

15.38 The ATO has advised that no entity should currently be accessing income tax concession under item 1.2, instead these entities should be accessing concessions as charities established for the advancement of religion. Therefore, this amalgamation does not amount

to a change in policy and will have no effect on the scope of entities that can access the exemption.

15.39 The amalgamation similarly applies across other Commonwealth tax laws, such as fringe benefits tax and goods and services tax where they itemise both religious institutions and charities in the same provisions but where the former is merely a subset of the latter.

15.40 To cater for cases where an entity is inadvertently accessing income tax exemption through the 'religious institution' category, the Consequential and Transitional Bill transitions these institutions into a 'registered religious institutions,' where these entities notify the ACNC in the prescribed manner. *[Schedule 1, Item 6]*

15.41 This transitioning of this subtype ensures consistency with the policy of transitioning subtypes that have unique tax concessions (such as public benevolent institutions and health promotion charities). *[Schedule 1, Items 3 and 4]*

15.42 Associated changes were also made to Division 50 to take into account and adopt the amendments being proposed by the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012.

15.43 Currently, charitable funds are exempt from paying tax under the items 1.5 of section 50-5. Section 50-5 separates certain charitable trusts into different items to reflect distinctions between institutions and funds, and that trusts established on or after 1 July 1997, or the funds or assets acquired by charitable trusts on or after 1 July 1997, are subject to the special conditions introduced in 1 July 1997.

15.44 The Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 is standardising the special conditions for charities, and therefore there is no longer any basis to separate these charitable entities into these categories and a requirement to have a distinction between fund and institution.

15.45 The ACNC Consequential and Transitional Bill eliminates the final distinction between fund and institution, which also ensures consistency with the ACNC Bill which will register charitable entities and not institutions or funds. *[Schedule 2, items 26 to 30]*

15.46 To ensure that funds established prior to 1 July 1997 (including returns earned by these funds on their stock of assets) are not required to comply with additional requirements a transitional provision in the *Income Tax (Transitional Provisions) Act 1997*. This ensures that the updated special condition only apply:

- to charitable trusts established on or after 1 July 1997; or
- to any funds or assets acquired or given to a charitable trust on or after 1 July 1997 where a charitable trust was operating prior to 1 July 1997. This includes any income derived from these funds or assets.

*[Schedule 2, item 40]*

15.47 Further changes to the tax law provisions clarify that references to entities listed in Division 30 means those entities that are endorsed as deductible gift recipients. This includes amendments to the *Income Tax Assessment Act 1936*. *[Schedule 2, items 1 to 3]*

### **Establishment and integration of the ACNC**

15.48 The ACNC Consequential and Transitional Bill makes consequential amendments to related Commonwealth legislation to cater for the establishment of the ACNC and ensure the smooth transition of the ACNC into the Commonwealth Government.

15.49 These amendments eliminate the need for the Australian Securities and Investments Commission (ASIC) to continue to regulate NFP entities that are incorporated under the *Corporations Act 2001*, and ensure that the ACNC has the legal infrastructure required to function effectively, for example to enable the ACNC to share information with other regulators. *[Schedule 3, Part 3]*

15.50 The ACNC Consequential and Transitional Bill amends Subdivision 426-B in Schedule 1 to the *Taxation Administration Act 1953*. This Subdivision sets out the ATO's endorsement processes for charitable entities under numerous tax laws including the *A New Tax System (Goods and Service) Act 1999*.

15.51 Amendments to the Subdivision ensure that changes to the endorsement conditions resulting from ACNC registration are taken into account when the ATO endorses charitable entities. *[Schedule 2, items 131 to 134]*

15.52 The ACNC Consequential and Transitional Bill removes certain administrative decisions taken by the ACNC from being subject to the *Administrative Decisions (Judicial Review) Act 1977*. *[Schedule 3, item 1]*

15.53 The ACNC Bill establishes processes for an entity to challenge certain decisions of the ACNC. These processes are consistent with the review and appeal rights under other Commonwealth legislation

(including taxation law), and cater for both internal and external merits review, and judicial review.

15.54 The ACNC Bill also allows appeals and reviews to be considered jointly with related administrative decisions of the Commissioner of Taxation, which are also not subject to the *Administrative Decisions (Judicial Review) Act 1977*.

15.55 Enabling the *Administrative Decisions (Judicial Review) Act 1977* to apply to the Commissioner's decisions is not required given the clear and robust review and appeal options available in the ACNC Bill, including the possibility of judicial review.

15.56 Additionally, given that administrative decisions of the Commissioner of Taxation and the ACNC will in practice be interlinked and jointly considered, subjecting ACNC decision to the *Administrative Decisions (Judicial Review) Act 1977* may allow entities to initiate multiple judicial reviews in order to frustrate the implementation of ACNC decisions at significant expense and inconvenience to relevant regulators, the Administrative Appeals Tribunal, and Federal Courts.

15.57 The ACNC Consequential and Transitional Bill also amends the definition of Australia in the *Australian Business Number Act 1999*. In the ACNC Bill, entities are required to have a Australian Business Number (ABN) prior to being eligible for ACNC registration.

15.58 The amendment ensures that where an entity is entitled to be a charity or deductible gift recipient but is unable to obtain an ABN because the entity is located in one of Australia's external Territories, these entities will nonetheless be able to obtain an ABN and therefore be entitled to be registered by the ACNC. [*Schedule 3, item 2*]

15.59 The ACNC Consequential and Transitional Bill also makes technical amendments to provisions of the tax laws conferring deductible gift recipient status on all entities providing volunteer based emergency services. The amendment ensures that all State and Territory government bodies that coordinate volunteer fire brigades and state emergency services can access deductible gift recipient status. [*Schedule 5, items 1 to 4*]

## **Minimising regulatory duplication**

15.60 Establishing the ACNC as the central regulatory body for the NFP sector will assist the sector through reduced regulatory duplication and will promote the good governance, accountability and transparency of NFP entities by ensuring that only those charities that are registered with



and regulated by the ACNC can access Australian Government concessions, exemptions and benefits.

15.61 Registered NFP entities would be required to comply with governance standards and meet reporting and notification obligations included in the ACNC Bill.

15.62 Currently, charities are regulated by numerous agencies at the Commonwealth level, and therefore, are likely to be reporting and providing the same set of information to multiple Commonwealth agencies.

15.63 The ‘charity passport’ which the ACNC will develop will enable registered entities to meet the majority of their financial and governance reporting requirements by reporting to the ACNC. This will help in minimising duplication in reporting obligations.

15.64 Consequential legislative amendments will be required to ensure that registered entities do not have the *legal obligation* to report on multiple occasions and meet duplicative regulatory obligations. The passport would ensure that the same information does not have to be provided on multiple occasions but would not eliminate the legal obligations on entities to provide this information.

15.65 The ACNC will not be responsible for monitoring service delivery outcomes and quality standards of NFP entities. Agencies that oversee these aspects of NFP entities operation will continue to play this role. Therefore, these entities will still require the legal authority to be able to collect information and regulate the quality standards of registered entities.

15.66 A balance needed to be struck between minimising regulatory obligations and ensuring agencies have sufficient power to fulfil all of their legal obligations.

15.67 Consequential legislative amendments were made where there is direct regulatory duplication. These include for example amendments to the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Aged Care Act 1997*, and the *Corporations Act 2001*.

15.68 The amendments to *A New Tax System (Family Assistance) (Administration) Act 1999* and the *Aged Care Act 1997* ensure that where information is provided to the ACNC, entities would not be legally obligated to provide this information to the ACNC. [*Schedule 2, items 142 and 148*]

15.69 The ACNC Consequential and Transitional Bill will make consequential amendments to the *Corporations Act 2001* (the Corporations Act) to address duplication for NFP entities, clarify the delineation of responsibilities between the ACNC and the Australian Securities and Investments Commission (ASIC), and reduce regulatory burden on the NFP sector. [*Schedule 3, Part 3*]

15.70 The consequential amendments will remove duplication by turning off the following requirements in the Corporations Act for entities registered with the ACNC: [*Schedule 3, Part 3*]

- the requirement for entities to notify ASIC of various matters, such as changes to its address or its directors, as these notifications will now be provided to the ACNC, as part of its ‘one-stop shop’ function;
- certain director’s duties for entities registered with the ACNC, as under the new regime, the responsible entities will be subject to equivalent governance standards that will be specifically tailored for the NFP sector. These governance standards will be set out in regulations that will commence on 1 July 2013;
- the financial reporting requirements in the Corporations Act, as these requirements are contained under the draft ACNC legislation. Further detail about the content of financial reports will be set out in the regulations that will commence on 1 July 2013; and
- the procedural requirements relating to the conduct of Annual General Meetings (AGMs), as an equivalent procedure, which will be simplified and tailored for the NFP sector, will be set out in regulations that will commence on 1 July 2013.

15.71 A regulation making power will enable other provisions of the Corporations Act to be turned off in respect of registered entities, and allow conditions to be imposed in respect of the provisions which are being turned off. This regulation making power is needed to allow further duplication in the Corporations Act to be addressed, as a result of future reporting and governance standards that will be developed following consultation and will commence from 1 July 2013.

15.72 Consequential amendments are also being made to expand the category of individuals able to conduct a review of a medium sized entity, which is intended to increase the supply of reviewers, and lower the costs associated with these reviews. [*Schedule 3, item 32*]

15.73 At the same time, appropriate safeguards will be maintained by ensuring that such individuals are subject to the oversight and continuing professional development requirements of the three professional accounting bodies, CPA Australia, the Institute of Chartered Accountants, and the Institute of Public Accountants.

15.74 The consequential amendments also clarify the responsibilities of ASIC and the ACNC, as entities registered with the ACNC will be primarily regulated by the ACNC, rather than ASIC, in relation to the day-to-day activities of the registered entity.

15.75 Under the new regime, ASIC will continue to register companies, including companies limited by guarantee, but will have limited oversight of the financial reporting and governance arrangements of those companies that choose to register with the ACNC, as oversight of these arrangements will be performed by the ACNC.

15.76 Currently, ASIC conducts surveillance of financial reports prepared by companies, registered schemes and disclosing entities, and their compliance with Part 2M.3 of the Corporations Act. ASIC will not continue to be responsible for financial reporting surveillance in respect of entities registered with the ACNC from 1 July 2013, as this function will instead be performed by the ACNC.

15.77 ASIC is currently responsible for registering authorised audit companies and registered company auditors, and will continue to do so under the new regime. As part of consequential amendments to the *Australian Securities and Investments Act 2001*, ASIC will retain the power to obtain information in respect of ACNC audits. [*Schedule 3, items 20 to 23*]

15.78 ASIC will also continue its current oversight role with respect to external administration processes, such as liquidations and administrations, undertaken under the Corporations Act. Do not remove section break.



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## **Chapter 16**

# **Regulatory Impact Statement: establishing a regulator for the not-for-profit sector**

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### **Background**

16.1 Australia's not-for-profit (NFP) sector consists of organisations which seek to achieve a community, altruistic or philanthropic purpose, and who are involved in the supply of goods and services that have a social value greater than the price that a consumer could or would otherwise pay.

16.2 NFPs contribute to community wellbeing through the provision of welfare, education, sports, arts, religious, culture and community services.

16.3 Australian governments provide the NFP sector with support in the form of direct funding and access to a range of taxation concessions.

- Total quantifiable Commonwealth taxation expenditures provided to the NFP sector in the 2010-11 financial year is estimated to be around \$3.3 billion (*Tax Expenditures Statement 2010*). Unquantifiable tax expenditures to the sector are likely to be of a similar magnitude, and consist mainly of income tax exemptions.
- Direct government funding to the sector in 2006-07 was estimated to be \$25.5 billion; see the 2010 Productivity Commission's *Contribution of the Not-for-Profit sector* (Productivity Commission 2010 p 300). This funding was provided to pay for the sector's delivery of programs and services on behalf of the Government, such as the Family Relationship Services Program.

16.4 The general public provides the sector with resources in the form of donations and volunteer time.

- Total public donations to the sector were estimated to be \$7.2 billion in 2006-07, with an estimated value of \$14.6 billion provided in volunteer time (Productivity Commission 2010 p 64)

## **Problem**

16.5 The NFP sector's regulatory framework is not meeting the needs of the NFP sector, Australian governments and the Australian public more broadly. The regulatory framework under which NFP entities operate is:

- fragmented and inconsistent;
- uncoordinated with regulatory responsibilities spread across a range of government agencies;
- producing complex reporting requirements which are, in certain situations, overlapping; and
- not adequately addressing the informational needs of the Australian public.

16.6 These shortcomings have left some NFP entities, particularly those operating across multiple jurisdictions, with an inappropriately high regulatory and compliance burden. It has also allowed other NFP entities, particularly small unincorporated associations, to operate under no regulatory oversight.

16.7 A typical large NFP would currently be required to provide general reporting (including financial reporting) to multiple Commonwealth agencies. For example, a large NFP entity which is a company limited by guarantee would be required to provide general financial reports to the ASIC. To receive grants and contracts for the delivery of Commonwealth Government services from various Government agencies such as the Department of Health and Ageing, the Department of Education, Employment and Workplace Relations (DEEWR) and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), the NFP entity would be required to provide additional general and specific financial reports to these agencies, resulting in a duplication of reporting.

16.8 Additionally, the NFP entity would need to meet governance requirements from each agency with respect to grants and would be generally required to get each report audited separately, which the sector has indicated costs, on average, \$1,000 per audit.

16.9 If the entity was an incorporated association operating across jurisdictions, it would need to provide general financial reports to different State and Territory regulators resulting in further duplication of reporting.

16.10 A medium sized NFP would typically be provided a smaller number of government grants and enter into a smaller number of contracts for Australian's government service delivery. This would reduce possible reporting and compliance burdens. However, unnecessary duplication would remain.

16.11 A typical small NFP entity with charitable status would have a small number or no government grants and enter into a limited number or no Australian government service delivery contracts. A typical example would be a private ancillary fund. These funds are required to submit a private ancillary fund return form on an annual basis which includes audited general purpose financial reports.

16.12 The regulatory burden faced by NFP entities operating with a high regulatory and compliance burden may be diverting scarce NFP resources away from intended targets toward administration and compliance expenses. Additionally, fragmented and inconsistent information coupled with a lack of publicly available information may be deterring philanthropic engagement.

16.13 Over the past decade there have five reviews into the regulation and taxation of the NFP sector in Australia, including the:

- 2001 Report of the inquiry into the Definition of Charities and Related Organisations;
- 2008 Senate Economics Committee inquiry into Disclosure Regimes for Charities and NFP Organisations;
- 2009 Australia's Future Tax System report (AFTS report);
- 2010 Productivity Commission report on Contribution of the Not-for-Profit sector; and
- 2010 Senate Economic Legislation Committee inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010.

16.14 These reviews have consistently concluded that the NFP sector's regulatory framework tends to add complexity and costs, especially for organisations operating in more than one jurisdiction, and recommended that the regulation of the NFP sector should be significantly improved by establishing a national NFP regulator and harmonising and simplifying regulatory and taxation arrangements.

16.15 The NFP sector has largely supported the recommendations made by these reviews.

16.16 *The NFP regulatory framework is fragmented, inconsistent and based on entity type rather than activities or outcomes.* The sector consists of 600,000 NFP entities. The majority (around 440,000) of these entities are unincorporated organisations that fall largely outside of the sector's regulatory framework.

- These entities do not have reporting obligations, Australian Business Numbers (ABNs) and cannot be endorsed as charities or DGRs. However, they are able to self-assess income tax exemptions.

16.17 Around 136,000 are incorporated associations under relevant State and Territory Acts, and around 11,700 are companies limited by guarantee, who are registered with ASIC. Relevant State and Territory government agencies regulate incorporated associations with ASIC regulating companies limited by guarantee.

16.18 The sector is also comprised of charitable trusts and private and public ancillary funds. These organisations manage and distribute funds to individuals and organisations for a charitable purpose. Charitable trusts and private and public ancillary funds tend to be endorsed as deductible gift recipients (DGRs) and charities. Charitable trusts are generally not required to comprehensively report to any regulator (they are required to be endorsed by the ATO), as such, little is known about the number and total value of the asset managed by charitable trusts. Based on confidential data the Government estimates that there are around 1,000 charitable trusts that access tax concessions.

16.19 The Crown, represented by State Attorneys-General, protects the property of charitable trusts. Attorneys-General are required for enforcement of the charitable trust. Anecdotal evidence suggests that Attorneys-General interventions are costly and thus infrequent.

16.20 The majority of NFP entities operate outside the sector's regulatory framework. This produces a lack of appropriate oversight over the activities and performance of the sector; ensures that there is insufficient data and information on the operations of the NFP sector; and may encourage organisations with improper or even illegal activities to exploit this significant gap in the sector's regulatory regime.

16.21 Occasional reports of improper practices by unregulated NFP entities have the potential to undermine the public's confidence in, and support of the sector. Without a systematic approach to accountability and transparency, regulators and governments more generally may find it difficult to counter suggestions of compliance and integrity issues.



16.22 The regulatory regime faced by NFP entities that are incorporated associations operating in a *single* jurisdiction have weaknesses detracting from the sector's effectiveness. The sector has expressed concerns related to information for selecting the best form of incorporation and compliance costs associated with reporting and other obligations, including to state government agencies that are not proportionate to scope of activity (PC report 2010 pp 113-135). Other concerns include passive oversight of the operation and activities of incorporated associations by state regulators.

16.23 Incorporated associations operating across multiple jurisdictions face an unnecessarily complex and costly regulatory environment. These entities are required to meet different reporting requirements that are imposed across different jurisdictions.

16.24 Regulatory overlap between Commonwealth, States and Territories can result in a high regulatory and compliance burden, but a poor level of regulatory oversight. Inconsistencies in the sector's regulatory framework and an increasing compliance burden are a matter of increasing concern to both the sector and governments. In their submission to the PC report, the Institute of Chartered Accountants stated:

- 'The paper [on Improving Corporate Reporting and Accountability] published by Treasury in 2007 specifically asked respondents a question 'Do you consider there is a need to harmonise the financial reporting requirements of companies limited by guarantee and incorporated associations to provide a consistent reporting framework for not for profit entities in Australia?' The submissions that are publicly available overwhelmingly support harmonisation.' (Institute of Chartered Accountants 2010 p 6)

16.25 To illustrate the level of complexity faced by the sector, there are currently more than 178 pieces of Commonwealth, State or Territory legislation that involve 19 separate agencies regularly determining the charitable purpose or status of an NFP entity.

16.26 The sector has expressed concerns in relation to this complexity. For example, in their submission to the PC report, the Institute of Chartered Accountants stated:

- '... the legislation governing these various structures is both inconsistent between the types of legal structures and inconsistent within the structures. For example, incorporated associations are controlled by individual state legislation, much of which is inconsistent when compared state to state. NFPs using this incorporated association structure now

increasingly find themselves operating across state boundaries and therefore their managers and advisers need to be familiar with a number of differing regulatory regimes.’ (Institute of Chartered Accountants 2010 p 5)

16.27 At the Commonwealth level regulatory oversight is spread across multiple Government agencies which increases compliance costs and complexity. The ATO, ASIC, the Office of the Registrar of Indigenous Corporations (ORIC), the national housing regulator for the NFP sector, and a range of government agencies that provide the sector with grants and contracts for service delivery (such as the FaHCSIA) oversee specific aspects of the sectors operations.

16.28 This structure has led to a number of shortcomings. For example, there is no agency overseeing the totality of the sector’s performance and activities; there is no agency collecting required information for the sector as a whole which could be used to develop policy and coordinate structural reforms; it produces unnecessary compliance costs with entities having to interact and engage with a number of agencies; and may be affecting public confidence and engagement with the sector.

16.29 Similar sentiments have been expressed by stakeholders. For example, Lyons, appearing before a Senate inquiry argued:

- ‘In the absence of a single regulator, governments lack data and knowledge of Australia’s not-for-profit organisations and are therefore unable to develop appropriate policies to better regulate them and encourage their formation ...’ (PC report 2010 p 116. Extracted from SSCE 2008, p 42)

16.30 In their submission to the PC report, Gilbert+Tobin stated:

- ‘... there is an urgent need to bring together the multiplicity of governance, taxation and fundraising regulatory arrangements, especially at the Commonwealth level ...’ (Gilbert+Tobin 2010 p 1)

16.31 Existing reporting arrangements for NFP entities are uncoordinated and complex, and do not take into account the differing size, risks and access to public monies of NFP entities.

16.32 The reporting obligation of a specific NFP entity depends on the entity’s legal form and activities. NFP entities may have a large, and in some instances, duplicative reporting burden. Other NFP entities that are unincorporated and receive no government funding have no reporting requirements.

16.33 There are four main types of reporting undertaken by NFP entities. They include:

- corporate and financial reporting associated with the legal structure under which entities are incorporated;
- financial, governance and performance information required for obtaining or acquitting government funding, or government funded service delivery contracts;
- information required for endorsement for concessional tax treatment; and
- information required for fundraising.

16.34 Corporate and financial reporting for companies limited by guarantee is determined by the *Corporations Act 2001*, with corporate and financial reporting by incorporated organisations determined by the relevant Associations Incorporation Act.

16.35 Under the *Corporations Act 2001*, companies are generally required to prepare a public financial report and directors' report consisting of financial statements, notes to the financial statements, and directors' declaration about the statement and notes.

16.36 In June 2010, the Government simplified the reporting framework for companies limited by guarantee. Under the new regime, a three-tiered differential reporting framework for companies was established.

- The first tier comprises companies with annual revenue less than \$250,000 which do not have DGR status. Companies falling in the first tier are exempt from preparing a financial report and a directors' report.
- The second tier comprises companies with annual revenue of less than \$250,000 that are a DGRs and companies with annual revenue of \$250,000 or more but less than \$1 million, irrespective of whether the company is a DGR. These companies prepare a financial report which they can elect to have reviewed rather than audited, a streamlined directors' report, and are subject to a streamlined process for distributing annual reports to members.
- The third tier comprises companies limited by guarantee with an annual revenue of \$1 million or more, irrespective of whether the company is a DGR. These companies are

required to prepare an audited financial report, a streamlined directors' report, and are subject to a streamlined process for distributing the annual report to members.

16.37 Corporate and financial reporting requirements for incorporated organisations have in the past been less onerous than requirements of companies limited by guarantee. However, given the reforms outlined above, requirements have become more onerous. For example, while unincorporated associations operate under a tiered reporting framework, the relevant threshold for the highest tier are lower when compared against Commonwealth level thresholds which means more companies fit into the top tier.

16.38 Additionally, reporting requirements for incorporated associations generally vary between states and territories adding to complexity and compliance costs faced by entities operating across multiple jurisdictions.

16.39 Reporting requirements associated with funding arrangements for the delivery of government services generally involve complex reporting obligations and result in the duplication of reporting requirements. The sector has indicated that this is particularly evident with acquittal of grants.

16.40 NFP entities entering service delivery contracts with the Government are required to provide information on financial health and performance, general capabilities and governance structures. This information is also required to be provided to regulatory agencies such as ASIC.

16.41 Public submissions received by the Government on the scope and functions of any NFP regulator as part of the scoping study for a national NFP regulator suggest that the sector's compliance costs are significant and that there is scope to streamline and remove reporting duplication. For example, Rotary Australian World Community Service Limited stated that:

- 'The 'report-once, use-often' model of reporting offers a streamlining of compliance requirements and a huge potential saving by reducing the duplication of reports for various users. This is particularly so where an entity is in receipt of grants from various governments or government agencies.' (Rotary Australian World Community Service Limited 2011 pp 4-5)
- In a similar vein UnitingCare Australia submitted: 'There would be enormous benefit in all governments committing to

a policy of ‘report-once, use-often’, especially in relation to organisational and compliance data requests. A commitment from at least State and Commonwealth leaders that they will move quickly toward adopting a ‘report-once, use-often’ policy would be welcomed by the sector. While we acknowledge that getting action from all levels of government to this principle will take time, we strongly encourage agencies within each level of government to start this process as soon as possible. Whilst this process would be best driven by an independent regulator this work could be initiated by other bodies such as COAG.’ (UnitingCare Australia 2011 p 9)

- Consumers Health Forum of Australia submitted: ‘CHF welcomes the proposal in the Consultation Paper for a “report-once, use-often” model of reporting, supported by a national regulator. This has the potential to substantially reduce the administrative burden of organisations that are currently required to provide similar reports to a range of entities.’ (Consumers Health Forum of Australia 2011 p 2)

16.42 When referring to the acquittal of government grants the North Queensland Land Council stated that:

- ‘There is a significant cost with complying with contractual reporting requirements for NTRB’s. For example, auditing costs are in the order of twenty to thirty thousand dollars per annum and we have to employ in-house a Certified Practising Accountant (CPA). We understand the need for proper compliance and it seems that one area where the compliance burden could be reduced would be the number of interim reports required throughout the financial year.’ (North Queensland Land Council 2011 p 4)
- The Association of Independent Schools of Western Australia, UnitingCare NSW and the ACT, UnitingCare Australia and the Chamber of Commerce and Industry WA made similar comments and quantified acquittal costs in a similar method.

16.43 Compliance costs associated with reporting obligations are difficult to accurately estimate and quantify for any sector operating in the Australian economy. These problems are particularly pronounced in the NFP sector. NFP entities do not report on the totality of activities, rather, on specific aspects of their operations. Furthermore, the sector is extremely diverse and a generalised number would be unhelpful and particularly misleading. *Given informational gaps, it is impossible to*

*estimate current compliance costs faced by the sector and changes in compliance costs that would arise due to the implementation of options considered in this regulatory impact statement (RIS). The PC report reached a similar conclusion.*

16.44 Public transparency over the activities of charities and other concessionally taxed entities is lacking.

16.45 Some information is currently available in relation to tax concessions on the Australian Business Register (ABR), with financial reports also available at a charge from ASIC and from some State and Territory agencies in relation to incorporated associations.

16.46 The lack of a single source of public information makes it difficult for members of the community seeking to access reliable information on charities and DGRs. The lack of public transparency could reduce public confidence in the sector, restricts informed choices and philanthropy more generally, and discourages appropriate levels of sector accountability and governance. For example, Whitelion Inc. submitted:

- ‘Whitelion believes that a NFP sector information portal would have a range of benefits to stakeholders across the community. Through listing all registered charities, the public would be better able to find information on a given charity, and indeed confirm the validity of a charity should there be doubts as to a charity appeal. Further, for Government agencies and philanthropic funders, the centralised provision of general purpose financials on an information portal provides scope for greater efficiency and rigour in risk assessments. Whitelion believes that a NFP information portal has the potential to increase transparency in the sector, and thus build public trust in the NFP sector.’ (Whitelion Inc. 2011 pp 2-3)

16.47 Overall, the sector’s regulatory framework has failed to keep up with modern tax and regulatory system developments and public expectations. Over the last decade, five reviews have recommended taxation and regulatory reform, and there has been significant reform internationally, including in the United Kingdom, United States, Canada, New Zealand and Ireland. Yet Australia has achieved only incremental changes.

16.48 Weaknesses in the NFP sector’s regulatory framework have created an environment where large and medium sized NFP entities, particularly those operating across multiple jurisdictions, are subject to excessive regulation, while smaller NFP entities, particularly small

unincorporated associations and small charities, have remained unregulated despite their access to public monies in the form of donations, access to tax concessions and Government grants.

16.49 This is hindering the ongoing growth of the sector and its ability to properly function and fully contribute in modern Australia.

## **Objectives of Government action**

16.50 The Government recognises the important role played by the NFP sector in establishing an inclusive and productive Australia. The Government has committed to deliver smarter regulation, reduce red tape, and improve transparency and accountability of the sector. The Government also committed to consulting with stakeholders throughout the reform process.

16.51 The Australian governments, the NFP sector and the public recognise that it is important the sector is well regulated so that it remains accountable to the communities it serves and that fund its diverse operations. For example, the Australian Council of Social Services (ACOSS) submitted to the 2010 Productivity Commission's report, *Contribution of the Not-for-Profit sector* (PC report):

- '... the community values the contribution of the sector and expects State, Territory and Commonwealth governments to help not-for-profits to flourish through appropriate regulation and concessional treatment. This is reflected in current legislation and regulations, which aim to assist non profit organisations by reducing costs, providing protection for members and directors, and by increasing the confidence of the public to make donations.' (PC Report 2010 p 114. Citing ACOSS 2010 p 28)

16.52 Specifically, objectives of the Government include:

- establishing a robust and streamlined regulatory framework for the sector while removing unnecessary duplication in regulatory and reporting arrangements; and
- strengthening the NFP sector's transparency, governance and accountability.

16.53 Comparable jurisdictions have recently reformed their regulation of the NFP sector. Oversight of charities and tax concessional NFP entities in the United Kingdom, Canada, New Zealand and the United

States is now undertaken by a single national regulator who requires regularly report on activities and financial performance. Improved reporting has been driven by the need to strengthen transparency, governance and accountability in a growing and dynamic sector.

## **Options that may achieve objective(s)**

16.54 To promote transparency, governance and accountability and limit the number of NFP entities that are operating under no regulatory oversight, the Government will look at options to ensure NFP entities and charities receiving Government support fall within the sector's regulatory framework and undertake periodic and proportional financial reporting.

16.55 The Government will also explore measures to reduce compliance burdens for NFP entities that face unnecessary high and inefficient level of regulatory and compliance burden. Options that centralise the Government's interaction with the NFP sector could help reduce compliance burdens. For example, a 'report-once, use-often' approach to reporting could be adopted in relation to financial reporting.

### **Option 1: Retain existing policy**

16.56 Under this option, regulatory responsibilities would remain scattered across different governments and government departments both within jurisdictions, and between jurisdictions. Government departments and agencies would continue to oversee the operation of NFP entities for different and sometimes overlapping purposes. This would result in continued unnecessary red tape and a high regulatory burden for the NFP sector.

16.57 Incremental changes to the regulatory framework could be implemented to reduce red tape and regulatory burden. However, these undertakings would largely be at the discretion of individual governments and government agencies.

16.58 Additionally, under this option there would be no body specifically established to oversee the operation and performance of the NFP sector. Therefore, NFP entities would continue to interact with several government agencies and departments for different purposes.

### **Option 2: Pursue the establishment of a national regulatory framework**

16.59 Under this option the Government would pursue the establishment of a national regulatory approach. At the centre of this



approach the Government could establish a NFP regulator that would undertake and centralise a broad range of regulatory functions; coordinate and oversee the simplification of regulatory arrangements; and ultimately provide a 'one-stop shop' for the NFP sector.

16.60 Any regulator could perform the following functions (the final list of activities would be determined in close consultation with sector stakeholders):

- assess and determine eligibility for charity and NFP status;
- educate the NFP sector about sector-specific issues and ensure compliance with relevant laws;
- establish a single general reporting framework;
- establish and enforce a national governance and disclosure framework for NFP entities;
- administer an administrative penalty regime for NFP entities which fail to comply with governance requirements;
- suspend or remove trustees/directors/responsible individuals or NFP entities that fail to comply with the law;
- take action to protect assets of NFP entities;
- assist with dispute management between members of NFP entities;
- establish a public information portal relating to NFP entities;
- replace the supervisory role of State and Territory attorneys-general in respect of charitable trusts;
- administer a national incorporated associations legislative scheme; and
- administer a national fundraising legislative scheme.

16.61 The Commonwealth does not have the necessary constitutional power to establish a national regulatory approach without the support of the States and Territories. The Government could pursue the establishment of a national regulatory approach through the Council of Australian Governments (COAG).

16.62 There are three alternatives for the establishment of a national NFP regulatory framework. Alternatives include a referral of powers by the States to the Commonwealth, a cooperative legislative regime based on model Commonwealth legislation or a cooperative legislative regime based on model state legislation. The form of the agreement would be determined following negotiations with the States and Territories.

16.63 A national regulatory approach could be conducive to harmonisation of criteria for tax concessions across jurisdictions, standard reporting arrangements for grants and other government funding, and a 'report-once, use-often' model. A national approach would maximise the reduction in red tape and regulatory burden faced by the sector.

16.64 The Government could pursue the establishment of a national regulatory approach through the establishment of a NFP working group which would report to COAG through the Standing Council for Federal Financial Relations (SCFFR).

### **Option 3: Establish the Australian NFP Administrator within the ATO.**

16.65 The Government could establish the Australian NFP Administrator (ANA) within the ATO. The ANA would sit within the ATO but would be structurally separated and branded.

16.66 The ANA could progress Commonwealth level regulatory reform while the Government pursues a national NFP regulatory approach through COAG. This would help address time lags required to obtain agreement between Commonwealth, State and Territories governments.

16.67 The ANA would determine the *status* of an organisation, for example charitable or NFP, and *register* entities as charities or PBIs only. To determine the status of a *NFP* entity, the ANA would use definitions and principles endorsed by the Australian Government. This could mean applying the current common law definition of charity or any statutory definition of charity which the Government is pursuing in its NFP reform package.

16.68 NFP entities that do not agree with the status provided by the ANA have various channels available to appeal. They are largely the same as what is currently available to entities that do not agree with the ATO's ruling over charitable status and access to tax concessions. They include: request for internal reviews; appeal through the administrative appeals tribunal; appeal through the Federal Court; appeal through the Full Federal Court; and appeal through the High Court of Australia.

- Requests for internal reviews would be undertaken free of charge. Costs associated with the other channels would be the same as is currently the case.

16.69 Registration for charities and PBIs would be voluntary. However, only registered entities would be eligible for tax and other concessions or benefits provided by the Commonwealth, such as exemptions from certain Commonwealth laws.

16.70 There would be no change to regulation for the remaining NFP entities, including those that currently self-assess. Later, the Government may decide that it is appropriate for these entities to be included into the sector's regulatory framework, requiring periodic reporting and formal registering. Any decision would be undertaken in consultation with the sector.

16.71 Under this option, existing regulators would retain their existing functions. For example, ASIC would retain its corporate governance functions and the ATO would continue to endorse entities for access to tax concessions as well as undertake compliance activity in relation to those concessions. The ANA would only be responsible for compliance of charities and NFP entities with respect to their NFP status and registration as charities.

16.72 Other activities which the ANA would undertake include:

- develop and maintain public information portal; and
- establish an Advisory Board made up of experts in the NFP sector, for example lawyers and accountants. The Advisory Board would be established to advise the ANA on a range of NFP issues.

16.73 Similar nations with significant NFP sectors, such as the United Kingdom, United States and New Zealand, have developed NFP information portals. Over the long term, jurisdictions that have introduced NFP information portals have seen improvements in public confidence and in philanthropy.

16.74 Public submissions received by the Government indicate that the sector is supportive of a public information portal which would provide information to the public on the goals and activities of the sector. For example, St John Ambulance Australia stated that a:

- 'NFP sector information portal could have many benefits to the public by making the activities of NFPs more transparent. This could have the benefit of improving accountability as

well as increasing public knowledge about the diversity and importance of activities offered by NFPs.’ (St John Ambulance Australia 2011 p 3)

16.75 The ANA would not increase and strengthen its educative role nor would it provide any governance support.

16.76 The ANA would be set up to begin its operations on 1 July 2011. From 1 July 2013, reporting by registered entities would commence and the information portal would go online. Reporting would be based on activity from the 2012-13 financial year.

16.77 The ANA would be established and fully funded from the Australian Government’s general revenue.

**Option 4: Establish an independent statutory office regulator called the Australian Charities and Not-for-profits Commission.**

16.78 Regulatory reform at the Commonwealth level could be progressed by a structurally separated office supported by the ATO which would turn into a statutory office. The statutory office would take over the role and responsibilities of the structurally separated office *supported* by the ATO, and be given additional responsibilities.

16.79 Under this Option, the ATO would structurally separate the role of determining entities’ charitable status (a role to pass to the new statutory body once it is in place) from the ATO’s ongoing revenue role of assessing access to tax concessions with respect to the not-for-profit sector.

16.80 The statutory office would be called the Australian Charities and Not-for-profits Commission (ACNC) and headed by a newly appointed Australian Charities and Not-for-profits Commission Commissioner (ACNC Commissioner). The ACNC would be required to separately report to Parliament and administer a legislative regime, including with remedial or penalty powers such as to obtain enforceable undertakings. ACNC’s powers of enquiry would either be ATO powers or comparable powers which would be legislated.

16.81 The statutory office would determine entities’ NFP status and register charities and PBIs; develop and maintain a public information portal; and provide secretariat services for the NFP Advisory Board.

- The public information portal would provide information for the public, the sector and government on each registered charity and PBI; and the sector with an avenue for online interaction with the regulator and guidance material. The

portal will interact with existing government databases and agencies, such as the ATO, the ABR, and ASIC's companies register.

16.82 The process of registering charities and PBIs would be based on the existing process used by the ATO in determining whether an entity is charitable. This is based on a common law definition of charity and charitable purpose. This would not have any effect on charities and PBIs compliance costs.

16.83 The statutory office would provide the sector with educative material and governance support, and would establish itself as a 'one-stop shop' body. More specifically, the statutory office would develop a reporting form that registered entities would use to access a range of government services and concessions.

16.84 Submitted reports would be used by the ACNC to provide a seamless approach for applications for ABNs, charitable status and endorsement for tax concessions. The ABR and ATO respectively would be required to formally endorse entities on ACNC's advice. Therefore, a seamless process would be created, reducing compliance costs and red tape faced by the sector.

16.85 NFP entities that are not registered by the ACNC would continue to go through the same endorsement processes. This would therefore require continued interaction with the ATO or self-assessment of eligibility for tax concessions.

16.86 The ACNC would also be expected to establish and run education programs and provide governance support to the sector, including through 'how to guides' and educative and guidance materials.

16.87 The ACNC would be responsible for consultation with the public, sector and government on the form and content of reporting requirements. This would be facilitated by the creation of an NFP reform implementation taskforce which would be headed by an interim independent ACNC Commissioner. The taskforce would begin operation on 1 July 2011.

16.88 The Implementation Taskforce will reside within Treasury and would work to ensure the ACNC is ready for operation by 1 July 2012. The taskforce would be expected to:

- engage with State agencies to negotiate use of the public information portal as a 'one-stop shop' for reporting to State agencies;

- engage with the ATO on infrastructure requirements and the transition of ATO staff and recruitment of new staff for the ACNC;
- provide input into the development of the legislation for the ACNC;
- consult with the public, the sector and government agencies, for the new NFP general reporting framework and the details of a public information portal; and
- work on developing the public information portal.

16.89 The ACNC would be set up to begin its operations on 1 July 2012. From 1 July 2013, reporting by registered entities would commence and the information portal would go online. Reporting would be based on activity from the 2012-13 financial year.

16.90 The ACNC would be established and fully funded from the Australian Government's general revenue. The NFP sector would not be required to pay cost recovery fees.

#### **Option 5: Establish an independent Financial Management and Accountability Act regulator called the Australian Charities and Not-for-profits Commission.**

16.91 The Government would progress Commonwealth level regulatory reform through a structurally separated NFP regulator supported by ATO. This regulator would evolve into a new *Financial Management and Accountability Act 1997* (FMA Act) independent regulator for the sector and would be called the ACNC to be headed by a newly appointed Australian NFP ACNC Commissioner.

16.92 As is the case under Option 4, the ACNC would determine the status of NFP entities and register charities and PBIs; develop and maintain a public information portal which would be more user friendly than the portal envisaged in Option 3; establish a NFP Advisory Board; consult with the sector on appropriate reporting requirements and structure for the information portal; and provide education programs and governance support to the sector.

- The appeals process and definition of charity and charitable purposes which the ACNC would use are the same as outlined under Option 3.

16.93 The structurally separated regulator would be required to undertake initial recruitment for the regulator. The key difference

between this Option and Option 4 is that the ACNC would be a completely separate entity by virtue of its FMA Act status. This would delay commencement of reporting and the launch of the public information portal.

16.94 The structurally separated office within the ATO would be created on 1 July 2011 with the ACNC to be established by 1 July 2012. Reporting would commence from 1 July 2014, based on activity undertaken during the 2013-14 financial year. At this stage, the information portal would also be developed with public access to coincide with the receipt of the first batch of reports.

16.95 The ACNC would be established and fully funded from the Australian Government's general revenue. The NFP sector would not be required to pay cost recovery fees.

## **Impact analysis**

16.96 The Government has developed and will implement a reform package to strengthen the performance of the NFP sector and ensure it is effectively meeting the needs of the Australian public. Overall, the Government's reform package would reduce compliance costs and red tape faced by the sector, while also improving the sector's accountability and transparency.

16.97 The options which were considered to address the problems outlined above would:

- produce a consistent and coordinated regulatory framework for the sector;
- centralise regulatory responsibilities within a single government agency;
- lead to streamlined and simplified reporting requirements for the majority of NFP entities;
- ensure all NFP entities receiving substantial amounts of public monies (most notably charities, PBIs and charitable trusts) fall within the sector's regulatory framework;
- support and strengthen the sector by providing educative material; and

- ensure there is information available to the Government and public on the performance and activities of the sector by introducing public information portal.

16.98 The NFP regulator would work to ensure that small charities, including charitable trusts, do not experience large and significant increases in compliance burden resulting from new reporting obligations. Reporting obligations would be proportional to size and risk posed by NFP entities and would therefore be significantly less for smaller charities.

16.99 All charities are currently required to be endorsed, as such, there would be no change to the compliance burden relating to endorsement for charitable status.

16.100 Given the lack of data, it is not possible for the Government to accurately estimate the number of charities that would fit into various segments of the sector (for example, small charities). This makes it extremely difficult to estimate the overall implication on compliance costs for the sector as a whole.

16.101 However, overall the Government considers, given information available and through discussion with the sector, that compliance burden would be reduced under all options considered (besides the option where the status quo would be maintained).

### **Option 1: Retain existing policy**

#### ***Effect on the sector***

16.102 Under this option, a segment of the NFP sector, primarily comprised of large NFP entities that undertake a range of activities such as the delivery of government services funded by a range of government agencies, would continue to face unnecessarily high and inefficient level of regulatory and compliance burden. These NFP entities would continue to be regulated, interact and report to different government agencies both across and between jurisdictions for different and overlapping purposes.

16.103 On the other hand, a segment of the NFP sector, mainly comprised of charitable trusts and small charities, would continue to operate under no regulatory oversight.

16.104 To reduce regulatory and compliance burden where appropriate, under the Government's direction individual government departments and agencies could endeavour to reduce regulatory burden and red tape faced by the sector. However, it is likely that such a disjointed, uncoordinated



approach would be counterproductive and unlikely to deliver significant benefits to the sector.

16.105 This view was expressed by stakeholders during recent consultation conducted by the Government. For example Australasian Society for HIV Medicine submitted:

- ‘A standard set of accounts would be great. AusAID and ACFID tried to do this but in fact, without a national regulator all they have done is impose another set of reporting to meet ACFID Code requirements and this inappropriate for organisations which have a development arm, but for whom overseas aid program activities are only a part of the whole organisation.’ (Australasian Society for HIV Medicine 2011 p 4)

***Effect on Government***

16.106 This option would amount to a continuation of current Government policy. Therefore, it will have no implication for the Government’s Budget over the forward estimates.

***Effect on the public***

16.107 This option would not deliver improved accountability and transparency, and a substantial number of NFP entities that account for a small number of the sector’s activity would continue to operate outside the sector’s regulatory framework.

16.108 The public would not have access to reliable and useful information on the activities of charities and PBIs and a point of contact for issues related to charities. Therefore, this option could reduce public confidence in the sector and restrict informed choices and philanthropy more generally.

16.109 Additionally, the regulatory burden faced by NFP entities operating with a high compliance burden could continue to divert scarce NFP resources away from core activities leading to a reduction in public confidence in the ability of NFP entities to fulfil their objectives.

**Option 2: Pursue the establishment of a national regulatory framework**

***Effect on the sector***

16.110 This option has the potential for greatest decline in compliance burden faced by the sector, and has the potential to ensure all NFP entities accessing public monies operate within the sector’s regulatory framework.

However, pursuing the establishment of a national regulatory framework would take time to implement and require State and Territory cooperation.

16.111 A national regulatory system for the NFP sector has the potential to reduce red tape and compliance costs, remove unnecessary duplication of required information across jurisdictions, improve transparency, increase philanthropy (through increased donations and volunteerism), and provide Australia with a system that will allow NFPs to focus on core activities.

16.112 The costs and benefits associated with this option, particularly in relation to regulatory and compliance burden will depend on the final scope of reforms which are agreed with the States and Territories. Given informational gaps which do not allow for accurate quantification of compliance costs, we would not be able to estimate potential reductions in compliance costs resulting from this Option.

16.113 Achieving State and Territory agreement may be difficult, however, it would provide significant benefits in terms of harmonisation and simplification. A national approach to NFP regulation will allow for the removal of the complex, inequitable and duplicative regulatory requirements which are currently in place for the NFP sector. It would also provide scope to expand regulatory oversight across the totality of NFP entities receiving public monies.

16.114 Mission Australia recently submitted in response to the Government's consultation paper on a NFP regulator that:

- 'Mission Australia supports the referral of powers from the States to the Commonwealth to establish a national NFP regulator. It is acknowledged that without State support and further progress through COAG, a less than optimal national regime would result with ongoing duplication and inconsistencies in regulatory treatment across jurisdictions.' (Mission Australia 2011 p 4)

GAAP Consulting submitted: 'The status quo is not an option for the reasons stated in the scoping study. Anything less than a national regulator for all not-for-profit entities would be a sub-optimal outcome; and a significant opportunity missed for generations.' (GAAP Consulting 2011 p 2)

### ***Effect on Government***

16.115 The impacts on the Government would ultimately depend on the final set of reform proposals agreed to by Australia, State and Territory

governments. At this stage, it is impossible to quantify any budgetary or related impacts on the Government.

***Effect on the public***

16.116 Ensuring that appropriate governance, accountability and transparency exists within the NFP sector through smarter regulation is expected to improve public confidence in the sector, promote informed choices and ultimately help secure the long term sustainability of the sector.

16.117 National regulatory frameworks characterised by independent charities regulators have been established in many comparable overseas jurisdictions, including New Zealand, the United Kingdom and Ireland. Canada has established a charity regulator (the Charities Directorate) within its relevant tax authority while in the United States, the Internal Revenue Service is responsible for regulating charities. These jurisdictions have experienced increased public engagement following implementation of reforms.

**Option 3: Establish the Australian Not-for-profits Administrator within the ATO.**

***Effect on the sector***

16.118 Under this option, the Government would establish a structurally separate regulator for the NFP sector within the ATO. The regulator would register charities and PBIs, oversee the performance of the sector including by collecting financial reports from all registered charities and PBIs on an annual basis, and develop and maintain a NFP information portal.

16.119 Existing regulators would retain their existing functions. Required reporting would be provided by the ANA to these regulators to allow them to carry out functions. However, this sharing of information would not be a seamless process.

16.120 Required information and reports would not be tailored to address the totality of reporting requirements and could therefore still warranted interaction with other regulators. Therefore, there would a move towards a 'report-once, use-often' approach, which would result in a reduction in compliance burden faced by NFP entities.

16.121 The criteria for endorsement and registration as a charity or PBI would be consistent with current definitions and principles. Therefore, charities or PBIs would not need to be re-endorsed by the new regulator.

- These criteria are currently expressed in common law. The Government is likely to provide the sector with a statutory definition of charity and PBI. A statutory definition would retain current principles and criteria and would therefore leave unchanged entities and activities eligible to be endorsed as charities and PBIs.

16.122 Compliance costs associated with regulatory obligations are difficult to accurately estimate for any sector operating in the Australian economy. For example, in a sector where regular reporting of financial performance is required it would be difficult to separate reporting and accounting expenses related to regulatory obligations and, reporting requested by owners or shareholders.

16.123 These problems are particularly pronounced in the NFP sector. NFP entities do not report on the totality of activities rather on specific aspects of their operations. *Given informational gaps, it is impossible to estimate current compliance costs faced by the sector and changes in compliance costs that would arise due to the implementation of options considered in this RIS. The PC report reached a similar conclusion.*

16.124 We are able to qualitatively describe the average impacts of options on certain segments of the NFP sector. In turn, this qualitative analysis would allow us to gauge whether options considered would increase or decrease compliance burden faced by a typical NFP entity in specific segments of the NFP sector.

16.125 Incorporated associations and companies limited by guarantee that undertake a range of activities are required to interact with a range of government agencies and therefore generally have onerous reporting requirements. These organisations tend to be large and medium sized NFP entities.

16.126 Under the new reporting arrangements, large and medium sized NFP entities would be required to report to the regulator on a regular basis. The information collected by the regulator would be shared with relevant Commonwealth agencies allowing charities and PBIs to meet a range of their reporting obligation with the one form. This form is not expected to cover the totality of charities and PBI information requirements; therefore, to the extent that there are informational gaps, charities and PBIs may still be required to interact with a range of government agencies, only to the extent necessary to meet specific information requirements of those agencies.

16.127 Charitable trusts and small charities with limited government interaction (such as the delivery of government services) currently have limited reporting obligations. This option would bring these NFP entities

that access public monies into the sector's regulatory framework by ensuring they register with the regulator on a voluntary basis if they wish to maintain their charitable status.

16.128 The level of reporting detail required would be tiered based on factors such as size, risks and access to public monies. The actual requirements would be established in consultation with the sector but requirements for smaller entities are expected to consist of basic financial data such as total revenue, total costs, estimates of net worth and contact details.

16.129 There is currently no data on the number of small charities operating in Australia. However, it is likely that most small charities are incorporated associations. Currently, there are around 136,000 incorporated associations operating in Australia. Incorporated associations are required to maintain up-to-date financial and operational information to meet requirements imposed by stakeholders such as current regulators and donors, and are required to report to regulators such as relevant State authorities.

16.130 Regular reporting to the NFP regulator may result in minor additional compliance burdens on small charities and would amount to inserting information already collected information into a standard forms. A conservative estimate would be that it would costs half of one working day in staff time for these entities to meet reporting obligations under this option.

- If all the reporting requirements of small charities that are incorporated associations were covered by the one form in the event of agreement with the States, these entities may experience a reduction in compliance burden resulting from the new reporting requirements (see 'Impact' section for Option 4).
- To the extent that reporting is still required for current regulators this option would lead to an increase in compliance burden. The upper bound estimate of increased compliance burden is half of one working day in staff time per annum.

16.131 Small charities, such as incorporated associations, that do not have the in-house capacity to collect up-to-date financial information engage professional service providers such as accountants. The sector has indicated that professional services are generally provided free of charge or at highly subsidised rates. Reporting requirements under this option would not be more onerous than current requirements, would be satisfied by information already collected to meet current requirements, and would

therefore have minor or no additional compliance costs for small charities such as incorporated associations.

- As part of the scoping study on a national NFP regulator the Government undertook targeted consultation with key stakeholders in the NFP sector. Stakeholders consulted were of the view that new reporting requirements would lead to minor increases in compliance costs faced by small charities.

16.132 We estimate that there are around 2,500 private ancillary funds. Private ancillary funds are also required to maintain up-to-date financial and operational information to meet requirements imposed by stakeholders and report periodically to the ATO. There would be no change in compliance burden faced by private ancillary funds as they would be required to report to the NFP regulator instead of the ATO.

16.133 In addition, we estimate that there are around 1,000 charitable trusts. Charitable trusts do not report to stakeholders, however, for internal purposes are required to maintain up-to-date financial information. Information needed to meet reporting obligations under this option would already be collected by charitable trusts. Therefore, regular reporting to the NFP regulator would have minor compliance costs for these entities and would amount to inserting already collected information into a standard form. A conservative estimate would be that it cost half of one working day in staff time for these entities to meet reporting obligations under this option.

16.134 This option would give rise to some sensitivities where the sector would see this as ‘interim regulation by the ATO’ of the sector, and where this would increase the reporting burden for a small number of charities.

16.135 Structural separation and branding would help to address the risk of a perceived conflict of interest between the Commissioner of Taxation’s revenue collection focus and the role as default NFP ACNC Commissioner.

- The establishment of an advisory board would mitigate concerns about sector engagement and help underpin the NFP sector’s confidence in the regulator’s decision making processes.

### ***Effect on Government***

16.136 The sector was of the view that education function would be required to ensure NFP entities are complying with regulatory objections

and would facilitate any adjustment to a new regulatory environment. For example, Wesley Mission submitted:

- ‘It should also have, as a core activity an education and training support function in addition to its regulatory responsibilities. This will go a long way to reducing the level of confusion currently within the sector.’ (Wesley Mission 2011 p 9)

16.137 Under this option, the ANA would not have any additional education role. The sector may therefore criticise the Government for not providing an education role.

16.138 The costs of structurally separating the role of determining NFP status and registering charities and PBIs from the ATO’s role of administering tax concessions; implementing general reporting; establishing and maintaining the NFP public information portal and undertaking related activities is estimated to cost \$14.3 million the forward estimates.

*Effect on the public*

16.139 The public would have access to more information on the activities of charities, a clear point of contact for issues related to charities. Therefore changes should generate confidence in the activities of charities.

**Option 4: Establish an independent statutory office regulator called the Australian Charities and Nor-for-profits Commission**

16.140 Under this option the Government would progress reform through a structurally separated area supported by the ATO which would turn into the ACNC from 1 July 2012. The statutory office would take over the role and responsibilities of the structurally separated office, and be given additional responsibilities.

*Effect on the sector*

16.141 The ACNC would provide the sector with a ‘one-stop shop’ for registration, tax concessions, and accessing other Australian Government services and concessions. Incorporated associations and companies limited by guarantee that are involved in a range of activities would only have to report to the ACNC. These NFP entities tend to be large and medium sized NFP entities.

16.142 This information would then be used to fulfil other Commonwealth level reporting obligations required for access to tax concessions and government service delivery contracts.

16.143 Incorporated associations that are charities would only report to the ACNC that would pass on required information to relevant agencies. The Implementation Taskforce would negotiate with State authorities to develop the public information portal as an 'one-stop shop' for reporting to State agencies. Therefore, incorporated associations would only be required to report to these regulators if there are informational gaps.

16.144 The Government expects that the move to the 'report-once, use-often' approach would reduce compliance burden associated with reporting for these large and medium sized NFP entities.

16.145 A large NFP would no longer be required to report to meet the numerous reporting requirements associated with legal form and, access to Government grants and contracts for service delivery. Instead of interacting with numerous Government agencies on numerous occasions (if, for example, two grants were acquired from a particular agency), the NFP entity would be required to report on one occasion to the NFP regulator. This would reduce auditing expenses that the sector has indicated costs, on average, \$1,000 per audit.

16.146 Charitable trusts and small charities with limited government interaction (such as the delivery of government services) currently have limited reporting obligations. This option would bring these NFP entities that access public monies into the sector's regulatory framework by ensuring they register with the regulator on a voluntary basis if they wish to maintain their charitable status.

16.147 The level of reporting detail required would be tiered based on factors such as size, risks and access to public monies. The actual requirements would be established in consultation with the sector but requirements for smaller entities are expected to consist of basic financial data such as total revenue, total costs, estimates of net worth and contact details.

16.148 There is currently no data on the number of small charities operating in Australia. However, it is likely that most small charities are incorporated associations. Currently, there are around 136,000 incorporated associations operating in Australia. Incorporated associations are required to maintain financial and operational information to meet requirements imposed by stakeholders such as current regulators and donors, and are required to report to regulators such as relevant State authorities.



16.149 Once agreement is reached with the State authorities, regular reporting to the NFP regulator as opposed to current regulators may result in a reduction in compliance burden associated with reporting. Incorporated associations would no longer be required to report to State authorities but instead to the NFP regulator. It is possible that the NFP regulator would require streamline reporting which could result in a marginal reduction in compliance costs (see paragraph 1.37 for further details).

16.150 More significant compliance savings would be achieved from the use of 'report-once, use-often' approach where entities could meet the totality of reporting obligations associated with grants and government service delivery contracts with the one form. The above assumes however that agreement with the States is obtained in regards to the method of interaction between the NFP regulator and existing State agencies. In the interim, it is expected that small charities may be faced with an increased reporting burden given the different reporting requirements of various States. However, as reporting requirements to the NFP regulator are very likely to be satisfied by information already produced, this impact would be mitigated.

16.151 Small charities, such as incorporated associations, that do not have the in-house capacity to collect up -to-date financial information engage professional service providers such as accountants. The sector has indicated that professional services are generally provided free of charge or at highly subsidised rates. Reporting requirements under this option would not be more onerous than current requirements, would be satisfied by information already collected to meet current requirements, and would therefore have minor or no additional compliance costs for small charities such as incorporated associations.

- As part of the scoping study on a national NFP regulator the Government undertook targeted consultation with key stakeholders in the NFP sector. Stakeholders consulted were of the view that new reporting requirements would lead to minor increases in compliance costs faced by small charities.

16.152 We estimate that there are around 2,500 private ancillary funds. Private ancillary funds are required to report periodically to the ATO and therefore maintain up -to-date financial and operational information. There would be no change in compliance burden faced by private ancillary funds as they would be required to report to the NFP regulator instead of the ATO.

16.153 In addition, we estimate that there are around 1,000 charitable trusts. Charitable trusts do not report to stakeholders, however, for internal purposes are required to maintain up -to-date financial

information. Information needed to meet reporting obligations under this option would already be collected by charitable trusts. Therefore, regular reporting to the NFP regulator would have a minor compliance cost for these entities and would amount to inserting already collected information into a standard form. A conservative estimate would be that it would cost half of one working day in staff time for these entities to meet reporting obligations under this option.

16.154 In general, the Government considers that this option has the potential to reduce compliance and administrative costs faced by the sector and in particular reduce costs once agreement with State authorities has been obtained. In other words, the reduction in compliance expenses associated with the 'report-once, use-often' approach, once fully implemented, would offset any additional costs resulting from reporting. However, small charities may see an increase in compliance costs in the initial stage of this option.

16.155 Compliance and administrative savings are hard to quantify particularly for this sector which has limited data on financial performance. It is noted, however, that during Government consultation with the sector, stakeholders indicated that a move toward a 'report-once, use-often' approach would lead to 'huge' savings in administrative and compliance costs (see paragraph 1.12 above for further information).

16.156 The sector would also benefit from the other services offered by the ACNC including the provision of education programs and governance support, and an information portal which is user-friendly. These services are likely to be more important for smaller entities that tend to be unincorporated organisations and charities. Larger charities have more resources to market their services and provide information to the public.

16.157 This option would provide the sector with an independent regulator who would leverage off ATO resources to conduct back office tasks on a more cost efficient scale. The regulator would be required to report to the Australian Parliament.

### ***Effect on Government***

16.158 Structurally separating the role of determining NFP status and registering charities and PBIs from the ATO's role of administering tax concessions; providing education programs and governance support; implementing general reporting; establishing and maintaining the NFP public information portal and undertaking related activities is estimated to cost \$53.6 million over the forward estimates.

***Effect on the public***

16.159 The public information portal and regular reporting by NFP entities are likely to boost the sector's transparency and accountability, leading to increased public confidence and engagement.

**Option 5: Establish an independent Financial Management and Accountability Act regulator called the Australian Charities and Not-for-profits Commission**

16.160 The impacts of this option are identical to those specified under Option 4. The key difference between Option 4 and 5 is that the NFP regulator would be an entirely new entity under Option 5 by virtue of its FMA Act status.

16.161 This option would result in a completely separate entity unable to leverage off the knowledge and support of the ATO. Therefore, this option would cost significantly more than Option 4.

16.162 There are high implementation risks associated with this option, resulting from delays caused by the two pass Cabinet process, as well as the legislative risks brought about by the need to legislate to introduce a new FMA Act agency.

16.163 This option is likely to be supported by the sector which has called for a new and independent regulator to deliver compliance, transparency and education gains. However, the practical implications for the sector and public would be identical under both Options 4 and 5.

16.164 Structurally separating the role of determining NFP status and registering charities and PBIs from the ATO's role of administering tax concessions; providing education programs and governance support; implementing general reporting; establishing and maintaining the NFP public information portal and undertaking related activities is estimated to cost around \$170 million over the forward estimates.

**Consultation**

16.165 Consistent with the direction provided by the Government during the 2010 election campaign, the Government plans to consult on design and implementation options for policy proposals. Consultation and public views would be elicited through the issuance of public discussion papers and other more focused consultation could occur through the NFP Sector Reform Council.

16.166 At this stage it is envisaged that the Government will release a public consultation paper on:

- reporting requirements of NFP entities, including consideration of appropriate thresholds to underpin a tiered reporting framework; and
- layout and content of the NFP public information portal.

16.167 Following the 2012 Commonwealth Budget, public consultation papers would invite public submissions, with targeted consultation (with key stakeholders including the NFP Reform Council, the ATO's Charities Consultative Committee, and State and Territory authorities) would also occur once the public consultation papers are in the public domain.

16.168 The Government would also consult through the issuance of legislative exposure drafts.

### **Recent reviews of the NFP sector**

16.169 The AFTS report and the PC report, both examined the appropriateness of the NFP sector's regulatory framework. The analysis and recommendations in both reports were informed by extensive public consultation.

16.170 The AFTS report found that 'The regulatory framework for NFP organisations is inconsistent and opaque' (AFTS 2009, Volume 1, p 208).

16.171 The PC report found that:

- 'The current regulatory framework for NFPs is characterised by uncoordinated regimes at the Commonwealth and State / Territory levels. Disparate reporting and other requirements add complexity and costs, especially for organisations operating in more than one jurisdiction ... (Productivity Commission 2010 p 113)'
- It recommended the development of a national NFP regulator to bring together Australian government regulatory functions and the encouragement of self-regulation instruments, such as voluntary codes of conduct, to enhance public trust and confidence.

16.172 Other recent reviews into the regulation and taxation of the NFP sector in Australia have taken place including the 2001 Report of the inquiry into the Definition of Charities and Related Organisations, the 2008 Senate Economics Committee inquiry into Disclosure Regimes for

Charities and NFP Organisations, and the 2010 Senate Economic Legislation Committee Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010.

16.173 The analysis and recommendations in these recent reviews of the NFP sector were also largely informed by extensive public consultation.

16.174 A consistent theme that has emerged from these reviews is that the regulation of the NFP sector would be significantly improved by establishing a national regulator, and harmonising and simplifying regulatory and taxation arrangements.

### **Government consultation on a NFP regulator**

16.175 The Government consulted on the goals and form of a regulator, and the scope and functions of regulation for the NFP sector as part of the scoping study for a national NFP regulator. Over 160 submissions were received. Feedback from submissions will be incorporated into the Final Report of the Scoping Study which is expected to be finalised around May 2011.

16.176 There was widespread support for a national and independent NFP regulator to reduce the red tape and regulatory burden faced by the sector. A consistent message emerged that a significant reduction in red tape and regulatory burden could only be achieved through a national NFP regulator.

16.177 Stakeholders expressed concerns in relation to the ability of an interim Commonwealth regulator to reduce red tape and the regulatory burden. These concerns mainly relate to the option that the Government only pursue regulatory reform at the Commonwealth level. The establishment of a Commonwealth regulator is likely to be perceived as an important step in the broader reform process where it is pursued parallel to a COAG reform agenda.

16.178 There was also widespread support for:

- streamlined and consistent reporting requirements; and
- a public information portal to provide a single, easily accessible source of detailed information about NFP entities and charities in Australia.

## **Conclusion and recommended option**

16.179 A truly national NFP regulator would provide the greatest benefits in terms of reducing regulatory overlap, red tape and compliance costs for the sector. However, achieving State and Territory agreement may be difficult and take time. In this light, a structurally separated regulator within the ATO or a new FMA Act agency could provide significant benefits for the NFP sector in a much shorter timeframe although there will be distributional issues in the transitional stage with net benefits mainly accruing to larger NFPs while smaller NFPs could face a small increase in compliance costs.

16.180 A balance needs to be struck between providing the sector with a fully separate and independent NFP regulator, with the cost of such a regulator, the need to avoid a new layer of bureaucracy and the need to avoid pre-empting any model that COAG may agree to.

16.181 Whilst Option 3 involves structural separation and branding, the benefits of this option are limited and are unlikely to meet the sector's expectations for regulatory reform. Under this option, the ANA would offer no additional educational support to the sector and therefore offer limited compliance and governance gains.

16.182 Except for the provision of a basic information portal with limited functionality and an Advisory Board, this option is consistent with what the ATO is currently providing the sector.

16.183 Importantly, this option would offer minor compliance costs savings from the 'one-stop shop' reporting.

16.184 Option 5 would meet the sector's desire for a new and independent regulator and deliver compliance, transparency and education gains. The option would come at a high cost caused by its resourcing demands. There are high implementation risks associated with this model given loss of access to knowledge and skills that exist in the ATO, as well as the legislative risks brought about by the need to legislate to introduce a new FMA Act agency, which would not be equipped with the knowledge or support of the ATO. Moreover, this option may pre-empt COAG consideration of NFP national regulatory reform, and would add another layer of bureaucracy.

16.185 In contrast, Option 4 would come at a lower cost than Option 3 and pose fewer implementation and legislative risks. Under this option, the ACNC could leverage off existing ATO resources, including staff, infrastructure and expertise. This option would deliver similar benefits as Option 5 including seamless regulation of the sector and education, transparency and compliance gains.

16.186 This model will provide an independent regulator for the sector and will therefore help to address the sector's concerns in relation to the ATO's perceived conflict of interest between its regulatory and revenue collection roles. This option will therefore provide timelier benefits to the sector without pre-empting COAG consideration of NFP national regulatory reform. For these reasons, Option 4 is the preferred model.

16.187 The Government would also pursue the Option 2. The interim NFP regulator would implement a voluntary registration scheme; develop a tiered mandatory reporting scheme; and create a public information portal.

16.188 The final form and structure of reporting requirements and the public information portal would be developed in close consultation with the sector and relevant government agencies and departments.

16.189 The combination of these options would help the Government establish a robust and streamlined regulatory framework for the NFP sector; strengthen the sector's transparency, governance and accountability; and provide the public with information on the sector commensurate to the level of support provided to the sector by the public.

16.190 The Government favours the adoption of Options 1, 3 and 5. These options would allow the government to implement long-term and short-term reform at the Commonwealth level.

16.191 The combination of Option 2 and 4 would allow the Government to implement immediate reform for the NFP sector at the Commonwealth level, while pursuing a national regulatory approach through the COAG process.

## **Implementation and review**

### **Implementation**

16.192 During its 2010 election campaign the Government committed to reform the NFP sector and consult widely on options for reform and strategies for implementation.

16.193 Consultation with the sector would occur prior to finalisation and implementation of preferred option.

### **Ongoing review**

16.194 The performance of the recommended options will be assessed qualitatively by ongoing monitoring of stakeholders' attitudes. Stakeholder views on changes implemented, including the final form and structure of reporting requirements, and the public information portal would be received primarily through the NFP Reform Council and the ATO's Charities Consultative Committee.

16.195 However, reporting is required for any regulator to effectively oversee the performance of the sector and costs are expected to be minor compared to funding and support the sector receives from the Government and the public.



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## **Chapter 17**

# **Statement of Compatibility with Human Rights**

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**Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011***

### ***Australian Charities and Not-for-profits Commission Bill 2012***

17.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview**

17.2 This Bill establishes a national regulator, and a national regulatory framework for the not-for-profit (NFP) sector.

17.3 The purpose of the Bill is to maintain, protect and enhance the public trust and confidence in the NFP sector.

17.4 The Bill will initially apply only to charities (including public benevolent institutions). However, it is expected that this regulatory framework over time will be extended to NFPs more generally.

17.5 Further context about the objects of the Bill and the broader NFP reform agenda of which it is a part are detailed in Chapter 1.

#### **Human rights implications**

17.6 The Bill engages the following human rights.

##### ***Right to privacy***

17.7 Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Privacy guarantees a right to secrecy from the public of private characteristics, actions or data.

17.8 Collecting, using, storing and sharing personal information amount to interferences with privacy.

17.9 In order for an interference with privacy not be ‘arbitrary’, the interference must be for a reason consistent with the ICCPR and reasonable in the particular circumstances.

17.10 ‘Reasonableness’, in this context, incorporates notions of proportionality to the end sought and necessity in the circumstances. Generally, this means that provisions interfering with privacy should be precise, that they should not give decision-makers too much discretion in authorising interferences, and that they should provide proper safeguards against arbitrary interference.

*Information gathering powers and monitoring warrant*

17.11 Information gathering powers and monitoring warrant regimes like the one established in this Bill engage the right to privacy in Article 17 of the ICCPR.

17.12 The provisions to facilitate investigation should be reasonable, necessary and proportionate to meeting the legitimate objective of regulating the NFP sector.

17.13 Under the Bill, the Australian Charities and Not-for-profits Commission (ACNC) will implement a report-once use often reporting framework, provide education and support to the sector, and establish the Australian Charities and Not-for-profits (ACN) Register.

17.14 Information contained in the ACN Register must be correct and accurate for the report-once, use-often framework to function effectively and reduce the red-tape faced by NFPs. The information gathering and monitoring power enables the Australian Charities and Not-for-profits Commission Commissioner (ACNC Commissioner) to validate the accuracy of the information contained in the ACN Register.

17.15 The ACNC will not be responsible for ensuring that product and service standards are met. However, to function effectively as a one-stop-shop regulator for the sector, the ACNC will need to have appropriate powers to take samples of products or inspect items on premises with a view to sharing the information gathered with authorities.

17.16 The investigation and monitoring powers of the ACNC override the privilege against self-incrimination by providing that, a person is not excused from producing information or documents or answering a question on the grounds that doing so would incriminate him or herself.

17.17 Consistent with the Guide to Framing Commonwealth Offences it is appropriate to override the privilege where its use could seriously

undermine the effectiveness of a regulatory scheme and prevent the collection of evidence.

17.18 For example, the privilege against self-incrimination does not apply in relation to the Australian Tax Office's coercive information-gathering powers under section 264 of the *Income Tax Assessment Act 1936*. As the ACNC is taking over the regulatory responsibilities of the ATO for registered entities it has been provided with equivalent powers. The Courts have accepted that retaining such a privilege in such cases would frustrate the regulator in the exercise of its functions.<sup>2</sup>

17.19 However unlike the powers of the ATO this legislation constrains the use of any incriminating evidence by providing both use and derivative use immunity to protect the rights of individuals.

17.20 It is also critical for the legislation to contain safeguards to protect the interests of registered entities and the privacy of employees of these entities. This will be balanced through having specific conditions that are required to be satisfied prior to using these powers.

17.21 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. These provisions are therefore consistent with the requirements of Article 17 of the ICCPR.

*Disclosure of personal information*

17.22 The disclosure of personal information by a government authority, as authorised in certain circumstances as part of the secrecy framework in the Bill, engages the right to privacy in Article 17 of the ICCPR.

17.23 The provisions that authorise the disclosure of personal information should be reasonable, necessary and proportionate to meeting the legitimate objective of regulating the NFP sector.

17.24 Under the Bill the secrecy framework authorises the disclosure of information to Australian Government agencies and on the ACN Register. There are also transitional secrecy provisions within the Bill that enable disclosure of protected taxation information from the Commissioner of Taxation to the ACNC for the ACN Register, and these disclosures are also subject to the secrecy framework within the Bill.

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<sup>2</sup> *Stergis v Commissioner of Taxation* (1989) 89 ATC 4442; *Donovan v Commissioner of Taxation* [1992] FCA 82; (1992) 92 ATC 4114; and *Deputy Commissioner of Taxation v Hugo John De Vonk* [1995] FCA 1715 (4 December 1995).

17.25 However, the Bill limits these disclosures by requiring the relevant ACNC officer to consider whether the disclosure is consistent with the objects of the Bill (which includes protecting and enhancing the public trust and confidence in the NFP sector) and to be satisfied that the protected ACNC information is being disclosed for a legitimate purpose.

17.26 This additional requirement for consideration against the objects of the Bill will provide the necessary safeguard against arbitrary interference with privacy and is therefore consistent with the requirements of Article 17 of the ICCPR.

### ***Presumption of innocence***

17.27 Article 14 of the ICCPR provides that all persons shall be equal before the courts and tribunals and everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

17.28 This Article imposes on the prosecution of an offence, the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt and ensures that the accused has the benefit of doubt.

17.29 As per paragraph 30 of UN Human Rights Committee, General Comment No. 32 (2004), this human right is normally engaged where public authorities make public statements affirming the guilt of the accused, shackle or keep defendants in cages during trials indicating that they may be dangerous criminals or allow the media to show news coverage that undermines the presumption of innocence.

### ***Placing the evidential burden on the defendant***

17.30 It could potentially be argued that where legislation places an evidential burden on the defendant, this may engage the right to a presumption of innocence under Article 14 of the ICCPR.

17.31 Under subsection 13.3(3) of the *Criminal Code*, ‘evidential burden’ means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

### **Secrecy framework**

17.32 Under the Bill, there are certain exceptions that apply to the general prohibition on the use, disclosure and on-disclosure of information protected under the secrecy framework.

17.33 Where an entity seeks to rely on these exceptions, the entity will bear the evidential burden to point to evidence, such as a document or

email, that suggests a reasonable possibility that they used the information or disclosed/on-disclosed the information in accordance with that exception.

17.34 It is common amongst Commonwealth secrecy regimes to place the evidential burden on the defendant where the defendant seeks to rely on an exception or defence to the general prohibition on disclosure of information (an offence-specific defence). This is appropriate because the defendant (in these situations) holds all of the evidence uniquely in their possession.

17.35 Despite the evidential burden resting on the entity, the prosecution retains the ‘legal burden’ of proof and is required to prove each element of an offence beyond reasonable doubt, consistent with the requirements of Article 14 of the ICCPR.

#### Obligations of responsible entities

17.36 Under the Bill, there are certain obligations and liabilities placed on the responsible entities of registered entities in order to ensure that registered entities and responsible entities are accountable for fulfilling their obligations under this law.

17.37 Where a responsible entity can prove illness at the relevant time, or that the responsible entity took all the actions that it would be reasonable in the circumstances to take to ensure that the registered entity complied with its obligations and liabilities, then the responsible entity would not be responsible for the obligation or liability (an offence-specific defence).

17.38 When seeking to rely on this offence-specific defence the responsible entity will bear the evidential burden to point to evidence, like a document or email, which suggests a reasonable possibility that they were ill at the relevant time or the extent of any participation in the management of the unincorporated association, or any reasonable steps taken by them.

17.39 This is consistent with the Attorney-General’s Department’s publication *A guide to framing Commonwealth offences, infringement notices and enforcement powers*, which states that an evidential burden of proof should generally apply to a defence where there is an offence-specific defence. In these situations, the defendant is in the best position to provide evidence justifying why they undertook the act that triggered the offence-specific defence.

17.40 Again, despite the evidential burden resting on the entity, the prosecution retains the ‘legal burden’ of proof and is required to prove

each element of an offence beyond reasonable doubt, consistent with the requirements of Article 14 of the ICCPR.

### **Conclusion**

17.41 The Bill is compatible with human rights because it advances the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

**Assistant Treasurer, the Hon David Bradbury**

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## ***Index***

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### **Australian Charities and Not —for profits Commission Bill 2012**

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 15-5(1)	1.80
Section 15-5(1)(c)	1.91
Subsection 15-5(2)	1.81
Subsections 15-5(3)	1.82, 1.83
Subsection 15-5(4)	1.83
Section 15-10	1.100, 1.101
Subparagraph 15-55(1)(d)(i)	11.70
Subsection 150-55(2)	11.70
Subsection 20-5(1)	3.19, 3.20, 3.25
Paragraph 25-5(1)(b)	3.26
Paragraph 25-5(1)(c)	3.42
Paragraph 25-5(1)(c) note	3.43
Subsection 20-5(2)	3.21, 3.25
Subsection 20-5(3)	3.22, 3.25
Paragraph 25-5(1)(b)	3.27
Paragraph 25-5(2)(b)	3.29, 3.26
Paragraph 25-5(3)(a)	3.32
Paragraph 25-5(3)(b)	3.36
Paragraph 25-5(3)(c)	3.38
Paragraph 25-5(3)(d)	3.40
Subsection 25-5(4)	3.44, 3.45, 3.58
Subsection 25-5(5)	3.47, 3.50, 3.55, 3.56
Subsections 25-5(5) and (6)	3.28
Subsection 25-5(6)	3.50
Section 30-5	3.66
Subsection 30-10(1)	3.66
Subsection 30-10(2)	3.67
Subsection 30-15(1)	3.68
Subsection 30-15(2)	3.73

*Australian Charities and Not-for-profits Commission Bill 2012 and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*

<b>Bill reference</b>	<b>Paragraph number</b>
Subsection 30-15(3)	3.76
Subsection 30-15(4)	3.74, 12.11
Section 30-20	3.70
Section 30-25	3.71
Subsection 30-30	3.72
Section 30-35	3.77, 12.11
Section 35-5	3.80
Paragraph 35-10(1)(a)	3.81, 3.83
Paragraph 35-10(1)(b)	3.81, 3.84
Paragraph 35-10(1)(c)	3.81, 3.85
Paragraph 35-10(1)(d)	3.81, 3.94
Paragraph 35-10(1)(e)	3.81, 3.96
Subsection 35-10(2)	3.97, 9.48
Paragraph 35-10(2)(a)	3.103, 3.105, 9.52, 9.55
Paragraph 35-10(2)(b)	3.103, 3.106, 9.52, 9.57
Paragraph 35-10(2)(c)	3.103, 3.111, 9.52, 9.61
Paragraph 35-10(2)(d)	3.103, 3.115, 9.52, 9.66
Paragraph 35-10(2)(e)	3.103, 3.116, 9.52, 9.70
Paragraph 35-10(2)(f)	3.103, 3.121, 9.52, 9.74
Paragraph 35-10(2)(g)	3.103, 3.122, 9.52, 9.76
Paragraph 35-10(3)(a)	3.124
Paragraph 35-10(3)(b)	3.125
Paragraph 35-10(3)(c)	3.126
Subsection 35-10(4)	3.123
Subsection 35-15(1)	3.127
Subsection 35-15(2)	3.128
Paragraph 35-15(2)(b)	3.129
Subsection 35-15(3)	3.131, 3.132
Section 35-20	3.135, 12.11
Subsection 40-5(1)	4.10
Subparagraphs 40-5(1)(a)(i) to (iii)	4.11



<i>Bill reference</i>	<i>Paragraph number</i>
Subparagraphs 40-5(1)(a)(iv) to (vi)	4.12
Subparagraph 40-5(1)(a)(vii)	4.13
Subparagraphs 40-5(1)(b)(i) and (ii)	4.11
Subparagraph 40-5(1)(b)(iii) to (v)	4.12
Subparagraph 40-5(1)(b)(vi)	4.13
Paragraph 40-5(1)(c)	4.13
Paragraph 40-5(1)(d)	4.14, 6.41
Paragraph 40-5(1)(e)	4.14
Paragraph 40-5(1)(f)	1.1, 4.15, 4.19
Paragraph 40-5(1)(g)	4.15, 4.21
Subsection 40-5(2)	4.16
Subsections 40-5(3) and (4)	4.22
Subsection 40-5(4) (note)	4.23
Section 40-10	4.25
Subsection 40-10(1)	4.34, 4.36
Subsection 40-10(2)	4.35, 4.36
Paragraph 40-10(2)(a)	4.27
Paragraphs 40-10(2)(b) and (c)	4.30
Paragraph 40-10(2)(d)	4.31
Paragraph 40-10(2)(e)	4.33
Subsection 40-10(3)	4.35, 4.40
Subsection 40-10(4)	1.1
Subsection 45-5(1)	5.42
Subsection 45-5(2)	5.30
Subsection 45-10(1)	5.31
Subsection 45-10(2)	5.33
Subsection 45-10(3)	5.35
Subsection 45-10(4)	5.37
Subsection 45-10(5)	5.36
Subsection 50-5(1)	5.58
Subsection 50-5(2)	5.53
Subsection 50-10(1)	5.54
Subsection 50-10(2)	5.55
Subsection 50-10(3)	5.56
Subsection 55-5(1)	6.8
Paragraph 55-5(1)(b)	6.9

*Australian Charities and Not-for-profits Commission Bill 2012 and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*

---

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 55-5(2)	6.10
Subsection 55-5(3)	6.14
Subsections 55-5(4) and (5)	6.17
Subsection 55-5(6)	6.18
Subsection 55-5(7)	6.19
Section 55-10	6.12
Section 60-5	6.36
Subsection 60-5(1)	6.34
Subsection 60-5(1) (note)	6.38
Subsection 60-5(2)	6.39
Section 60-10	6.49
Subsection 60-10(2)	6.53, 6.54
Subsection 60-15(1)	6.51
Section 60-20	6.94
Section 60-25	6.93
Subsection 60-30(1)	6.100
Paragraph 60-30(1)(d)	6.101
Subsection 60-30(2)	6.102
Subsections 60-30(3) and (4)	6.106
Section 60-35	6.107
Section 60-40	6.108
Section 60-45	6.110
Subsections 60-45(3) and 60-50(3)	6.111
Subsections 60-45(4) and 60-50(4)	6.112
Section 60-50	6.110
Section 60-55	6.113
Section 60-60	6.50
Section 60-65	6.60
Subsections 60-65(1) and (2)	6.45, 6.46
Subdivision 60-E	6.64
Section 60-75	6.66
Subsection 60-75(6)	6.67
Section 60-80	6.66
Subsection 60-80(6)	6.67
Section 60-85	6.55
Subsection 60-85(2)	6.58

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 60-85(3)	6.56
Subsection 60-90	6.59
Section 60-95	6.70, 6.71
Subsection 60-95(1)	6.72
Subsection 60-95(2)	6.73
Section 60-95(2)	6.75
Subsection 60-95(3)	6.76
Subsection 60-95(4)	6.77, 6.78
Paragraph 60-95(4)(f)	6.82
Section 60-100	6.89
Paragraphs 60-100(3)(a) and (b)	6.90
Paragraph 60-100(3)(c)	6.91
Section 60-105	6.86
Section 65-5	7.6
Section 65-5(1)	7.30
Paragraphs 65-5(1)(a) and (b)	7.7
Paragraph 65-5(1)(c)	7.8
Paragraph 65-5(1)(d)	7.11
Paragraph 65-5(1)(e)	7.16
Subsection 65-5(2)	7.16
Paragraphs 65-5(2)(a) and (b)	7.17
Paragraph 65-5(2)(c)	7.18
Subsection 65-5(3)	7.21
Section 65-5(4)	7.24
Paragraph 65-5(4)(a)	7.25
Paragraph 65-5(4)(b)	7.26, 7.28
Paragraph 65-5(4)(c)	7.27
Subsection 65-5(5)	7.29
Subsection 70-5 (1)	8.20
Subsection 70-5(2)	8.25
Subsection 70-5(3)	8.26
Subsection 70-5(4)	8.27
Subsection 70-5(5)	8.29
Subsection 70-5(6)	8.30
Section 70-10	8.31
Section 70-20	8.33

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 70-15 (1)	8.34
Subsection 70-15(2)	8.37
Subsection 70-15(3)	8.38
Subsection 70-15(4)	8.40
Subsection 70-25(1)	8.41
Subsection 70-25(2)	8.42, 8.53
Section 75-5	8.58
Section 75-10	8.59
Subsection 75-15(1)	8.54
Subsection 75-15(2)	8.56
Section 75-20	8.60, 8.67
Subsection 75-25 (1)	8.68
Subsections 75-25(2) and (3)	8.70
Paragraph 75-25(3)(b)(ii)	8.71
Paragraph 75-25(4)(a)	8.74
Paragraph 75-25(4)(b)	8.75
Paragraph 75-30(2)(b)	8.78
Paragraph 75-30(2)(c)	8.79
Subsection 75-30(3)	8.82
Subsection 75-30(4)	8.83, 8.84
Subsection 75-30(5)	8.86
Subsection 75-30(6)	8.88
Subsection 75-30(7)	8.91
Section 75-35	8.92
Paragraph 75-35(2)(c)	8.95
Subsections 75-35(3) and 75-35(4)	8.96
Subsection 75-35(5)	8.97
Subsections 75-40(1), (2) and (3)	8.98
Subsection 75-40(4)	8.99
Subsection 75-40(5)	8.100, 8.102
Subsection 75-45(1)	8.104
Subsection 75-45(2)	8.105
Subsection 75-45(3)	8.107
Subsection 75-45(4)	8.109
Subsection 75-45(5)	8.108
Subsection 75-45(6)	8.110

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 75-50(1)	8.111
Subsection 75-50(2)	8.112, 8.113, 8.114
Subsection 75-50(3)	8.117
Section 75-55	8.118
Section 75-60	8.119
Subsection 75-65(1)	8.121
Subsection 75-65(2)	8.121, 8.123
Subsection 75-65(3)	8.121, 8.137
Subsection 75-65(4)	8.124
Subsection 75-65(5)	8.125
Subsection 75-65(6)	8.126
Subsection 75-65(7)	8.128
Subsection 75-65(8)	8.130
Subsection 75-65(9)	8.131
Subsection 75-65(10)	8.134
Subsection 75-70(1)	8.135, 8.139
Subsection 75-70(2)	8.136
Subsection 75-70(4)	8.138
Subsection 75-75(1)	8.140
Subsection 75-75(2)	8.142
Subsection 75-75(3)	8.141
Subsection 75-80(1)	8.143
Subsection 75-80(2)	8.144
Subsection 75-85(1)	8.145
Subsection 75-85(2)	8.146
Subsection 75-85(3)	8.147
Subsection 75-85(4)	8.148
Paragraph 75-85(4)(f)	8.149
Subsection 75-90(1)	8.150
Subsection 75-90(2)	8.151
Subsection 75-90(3)	8.152
Subsection 75-95(1)	8.153
Subsection 75-95(2)	8.155
Subsection 75-95(3)	8.157
Subsection 75-95(4)	8.158
Subsection 75-95(5)	8.159

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 75-95(6)	8.160
Paragraph 80-5(1)(a)	9.90
Paragraph 80-5(1)(b)	9.90
Paragraph 80-5(1)(c)	9.90
Paragraph 80-5(2)(a)	9.95
Paragraph 80-5(2)(b)	9.96
Subsection 80-5(3)	9.90
Paragraph 85-5(1)(a)	9.102
Paragraph 85-5(1)(b)	9.102
Paragraph 85-5(1)(c)	9.102
Subsection 85-5(2)	9.108
Subsection 85-5(3)	9.100
Subsection 85-10(1)	9.110
Paragraph 85-10(2)(a)	9.114
Subsection 85-10(3)	9.115
Paragraph 85-10(2)(b)	9.119
Paragraph 85-10(4)(a)	9.121
Paragraph 85-10(4)(b)	9.123
Subsection 85-10(5)	9.125
Section 85-15	9.126
Subsections 85-20(1) and 85-20(3)	9.131
Subsections 85-20(2) and (4)	9.132
Subsections 85-20(5) and 85-20(6)	9.134
Section 85-25	9.137
Paragraph 85-25(a)	12.11
Paragraph 85-25(b)	12.11
Paragraph 85-25(c)	12.11
Section 85-30	13.167
Subsection 85-30(1)	9.140
Subsection 85-30(2)	9.141, 9.142
Subsection 90-5	9.146
Section 90-10	9.150
Subsection 90-10(1)	9.151
Subsection 90-10(2)	9.152
Subsection 90-10(3)	9.154
Subsection 90-10(4)	9.155

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 90-10(5)	9.157
Subsection 90-10(6)	9.156
Subsection 90-15(1)	9.158
Subsection 90-15(2)	9.160
Paragraph 90-15(3)(a)	9.164
Paragraph 90-15(3)(b)	9.165
Paragraph 90-15(3)(c)	9.167
Paragraph 90-15(3)(d)	9.169
Section 95-5	9.176
Section 95-10	9.177
Section 95-15	9.181, 9.186
Subsection 95-15(1)	9.182, 9.183
Subsection 95-15(2)	9.187, 9.188
Subsection 95-15(3)	9.191, 9.193
Subsection 95-20(1)	9.194
Subsection 95-20(2)	9.197
Section 95-25	9.180
Paragraph 95-30(1)(a)	9.184
Paragraph 95-30(1)(b)	9.184
Paragraph 95-30(1)(c)	9.184
Paragraph 95-30(2)(a)	9.189
Paragraph 95-30(2)(b)	9.189
Paragraph 95-30(2)(c)	9.189
Section 95-35	9.179
Section 95-40	9.198
Section 100-5	9.200
Subsection 100-5(1)	9.201
Subsection 100-5(2)	9.203
Subsection 100-5(3)	9.206
Subsection 100-10(1)	9.215
Subsection 100-10(2)	9.219
Subsection 100-10(3)	9.216
Subsections 100-10(4) and (5)	9.217
Subsection 100-10(6)	9.218
Subsection 100-10(7)	9.220
Subsection 100-10(8)	9.221

*Australian Charities and Not-for-profits Commission Bill 2012 and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*

---

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 100-10(9)	9.225
Subsections 100-10(10)	9.231
Paragraph 100-10(10)(a)	12.11
Paragraph 100-10(10)(b)	12.11
Subsection 100-15(1)	9.223
Subsection 100-15(2)	9.224
Subsections 100-15(3) and (4)	9.217
Subsection 100-15(5)	9.218
Subsection 100-15(6)	9.225
Subsection 100-15(7)	9.231, 12.11
Subsection 100-20(1)	9.233, 9.235
Subsection 100-20(2)	9.234, 9.235
Subsection 100-20(3)	9.237
Subsection 100-25(1)	9.241, 9.242
Subsection 100-25(2)	9.243, 9.244
Subsection 100-25(3)	9.245, 9.246
Subsection 100-25(4)	9.247
Subsections 100-30(1) and 100-30(3)	9.252
Subsections 100-30(2) and 100-30(4)	9.253
Subsection 100-35(1)	9.257
Subsection 100-35(2)	9.258
Subsection 100-35(3)	9.260
Subsection 100-35(4)	9.261
Subsection 100-40(1)	9.263
Subsection 100-40(2)	9.264
Section 100-45	9.265
Section 100-50	9.267
Subsection 100-55(1)	9.268
Subsection 100-55(2)	9.269
Subsection 100-60(1)	9.271
Subsection 100-60(2)	9.274, 9.275
Subsection 100-60(3)	9.276
Subsection 100-65(1)	9.279
Subsection 100-65(2)	9.280
Subsection 100-65(3)	9.281
Subsection 100-65(4)	9.282



<i>Bill reference</i>	<i>Paragraph number</i>
Subsections 100-70(1) and (2)	9.283
Paragraph 100-70(1)(c)	9.284, 9.285
Subsection 100-70(3)	9.287
Subsection 100-70(4)	9.290
Subsection 100-70(5)	9.288, 9.289, 9.292, 9.293
Subsection 100-70(6)	9.294
Section 105-5	10.5
Section 105-10	10.6
Section 105-15	10.8
Section 105-20	10.9
Subsection 110-5(1)	10.10
Subsection 110-5(2)	10.11
Subsection 110-10(1)	10.12
Subsection 110-10(2) and (3)	10.13
Subsection 110-15	10.14
Section 110-15 note	10.51
Subsection 110-20(1)	10.17
Subsection 110-20(2)	10.19
Subsection 115-5(1)	10.21
Subsection 115-5(2)	10.22
Section 115-10	10.23
Section 115-10 note	10.24
Section 115-15	10.25
Section 115-20	10.26
Section 115-25	10.27
Section 115-30	10.28
Section 115-35	10.29
Section 115-40	10.31
Section 115-45	10.32
Subsection 115-50(1)	10.33
Paragraph 115-50(2)(a)	10.33
Paragraph 115-50(2)(b)	10.33
Paragraph 115-50(2)(c)	10.33
Paragraph 115-50(2)(d)	10.33
Subsection 115-55(1)	10.36

*Australian Charities and Not-for-profits Commission Bill 2012 and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*

---

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 115-55(2)	10.37
Section 120-5	10.41, 10.42
Section 120-5 (note)	10.42
Subsection 120-10(1)	10.45
Subsection 120-10(2)	10.46
Section 125-5	10.47
Section 125-10	10.53
Section 125-15	10.54
Subsection 130-5(1)	10.55
Subsection 130-5(2)	10.56
Section 135-5	10.59
Paragraph 135-10(a)	10.62
Paragraph 135-10(b)	10.60
Subsection 135-15(1)	10.63
Subsection 135-15(2)	10.65
Subsection 135-15(3)	10.67
Subsection 140-5(1)	10.72, 10.75
Subsection 140-5(2)	10.75
Subsection 140-5(3)	10.76
Subsection 140-5(4)	10.77
Section 140-10	10.73
Subsection 140-15(1)	10.80
Subsection 140-15(2)	10.81
Subsection 140-15(3)	10.81
Subsection 140-20(2)	10.82, 10.83
Subsection 140-25	10.84
Subsection 140-30(1)	10.85
Subsections 140-30(2) and 140-30(3)	10.86
Subsection 140-30(4)	10.87
Section 140-35	10.88
Subsection 145-5(1)	10.90
Subsection 145-5(2) and (3)	10.92
Subsection 145-5(4)	10.94
Subsection 145-5(5)	10.95
Subsection 145-5(6)	10.97
Subsection 145-5(7)	10.98, 10.99

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 145-5(8)	10.100
Subsection 145-5(9)	10.93
Section 150-5	11.2
Paragraph 150-5(a)	11.3
Paragraph 150-5(b)	11.4
Section 150-10	11.27
Paragraph 150-10(a)	11.28
Paragraph 150-10(b)	11.28
Paragraph 150-10(c)	11.28
Paragraph 150-10(d)	11.28
Section 150-15	11.22
Section 150-20	11.45
Section 150-25	11.31
Subsection 150-25(1)	11.32
Subparagraph 150-25 (1)(c)(i) and subsection 150-25(2)	11.39
Subparagraph 150-25(1)(c)(i) and subsection 150-25(3)	11.38
Paragraph 150-25(2)(a)	11.40
Paragraph 150-25(2)(b)	11.40
Paragraph 150-25(2)(c)	11.40
Section 150-30	11.39
Section 150-35	11.39
Paragraph 150-35(a)	11.47
Paragraph 150-35(b)	11.48
Paragraph 150-35(c)	11.50
Section 150-40	11.39, 11.52
Paragraph 150-40(a)	11.57
Paragraphs 150-40(b) and 150-40(c)	11.55
Section 150-45	11.59
Section 150-50	11.61
Subsection 150-55(1)	11.64, 11.67
Paragraphs 150-55(1)(a) and 150-55(1)(c)	11.66
Paragraph 150-55(1)(b)	11.66
Subparagraph 150-55(1)(d)(i)	11.69
Paragraph 150-55(2)(a)	11.71
Paragraph 150-55(2)(b)	11.71
Paragraph 150-55(2)(c)	11.71

*Australian Charities and Not-for-profits Commission Bill 2012 and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 150-55(3)	11.69
Section 150-60	11.70
Subsection 150-60(1)	11.72
Subsection 150-60(2)	11.75
Section 150-65	11.70, 11.77
Subsection 155-5(1)	12.3, 12.16
Subsection 155-5(2)	12.9
Section 155-10	12.12
Section 160-5	12.17
Subsection 160-10(1)	12.19
Subsection 160-10(2)	12.21
Subsection 160-10(3)	12.22
Subsections 160-10(4) and (5)	12.24
Subsection 160-10(6)	12.25
Subsection 160-10(7)	12.25, 12.35
Subsection 160-15(1)	12.26
Subsections 160-15(2) and (3)	12.27
Subsection 160-20(1)	12.31
Paragraph 160-20(1)(b)	12.32
Subsection 160-20(2)	12.33
Subsection 160-20(3)	12.34
Paragraph 160-25(a)	12.35
Paragraph 160-25(b)	12.88
Section 165-10	12.50
Section 165-15	12.73
Section 165-20	12.77
Paragraph 165-25(1)(a)	12.81
Paragraph 165-25(1)(b)	12.83
Section 165-25	12.84
Section 165-30	12.85
Section 165-35	12.87
Paragraph 165-40(a)	12.37
Paragraph 165-40(b)	12.38
Section 165-45	12.45
Subsection 165-45(2)	12.46
Section 165-50	12.41

<i>Bill reference</i>	<i>Paragraph number</i>
Sections 165-55	12.97, 12.100
Section 170-5	12.89
Section 170-10	12.90
Section 170-15	12.92
Subsection 170-20(1)	12.93
Subsection 170-20(2)	12.94
Section 170-25	12.95
Section 170-30	12.97, 12.100
Subparagraph 170-30(1)(a)(ii)	12.99
Section 175-5	13.102
Paragraph 175-10(1)(a)	13.103
Paragraph 175-10(1)(b)	13.104
Subsection 175-10(2)	13.106
Subsection 175-10(3)	13.107
Section 175-15	13.109
Subsection 175-20(1)	13.110, 13.112
Subsection 175-20(2)	13.113
Subsection 175-20(3)	13.114
Paragraph 175-25(a)	13.116
Paragraph 175-25(b)	13.117
Paragraph 175-25(c)	13.118
Subsection 175-30(1)	13.121
Paragraph 175-30(2)(a)	13.122
Paragraph 175-30(2)(b)	13.123
Subsection 175-30(3)	13.124
Section 175-35	13.129, 13.168
Paragraph 175-40(1)(a)	13.132
Paragraph 175-40(1)(b)	13.133
Subsection 175-40(2)	13.134
Subsection 175-40(4)	13.136
Section 175-45	13.141
Section 175-50	13.141, 13.142
Section 175-55	13.143
Section 175-60	13.144
Subsection 175-60(2)	13.145
Subsection 175-60(2) note	13.146

*Australian Charities and Not-for-profits Commission Bill 2012 and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*

<b>Bill reference</b>	<b>Paragraph number</b>
Subsection 175-60(3)	12.11, 13.149
Section 175-65	13.151
Section 175-70	13.152
Subsection 175-70(1)	13.154
Subsection 175-70(2)	13.153
Subsection 175-70(2) note 1 and 2	13.159
Subsection 175-70(3)	13.155
Subsection 175-70(4)	13.156
Subsection 175-70(5)	13.161
Subsection 180-5(1)	13.173
Subsection 180-5(2)	13.175
Subsection 180-5(3)	13.176
Subsections 180-10(1) and (2)	13.178
Subsection 180-15(2)	13.181
Subsection 180-15(3)	13.182
Subsection 180-20(1)	13.190
Subsection 180-20(3)	13.193
Subsection 180-20(4)	13.192, 13.194
Section 180-30	13.198
Subsection 180-30(3)	13.199
Section 180-35	13.177, 13.194
Subsection 190-10(1)	13.10
Subsection 190-10(2)	13.11, 13.12
Subsection 190-10(3)	13.13
Subsections 190-10(4) and note in subsection 190-10(4)	13.14
Section 190-15	6.39, 13.15
Section 190-20	13.16
Subsection 190-25(1)	13.18
Subsection 190-25(2)	13.19
Subsection 190-25(3)	13.20
Subsection 190-25(4)	13.21
Subsection 190-25(5)	13.22
Subsection 190-25(6)	13.23
Subsection 190-25(7)	13.24
Section 190-30	13.25
Subsection 190-35(1)	13.26

<i>Bill reference</i>	<i>Paragraph number</i>
Subsection 190-35(2)	13.27
Subsection 190-35(3)	13.28
Subsection 195-5(1)	13.36
Subsection 195-5(2)	13.37
Subsection 195-5(3)	13.38
Subsection 195-10(1)	13.39
Subsection 195-10(2)	13.40
Subsection 195-10(3)	13.41
Section 205-10	13.76
Paragraph 205-15(c)	9.81
Paragraph 205-15(d)	9.81
Paragraph 205-15(e)	9.81
Subsection 205-5(1)	13.44
Subsection 205-5(2)	13.46
Subsection 205-5(3)	13.48
Subsection 205-5(4)	13.51
Subsection 205-5(5)	13.53
Subsection 210-10(2)	13.59
Section 205-20	9.80, 9.259
Subsection 205-25(1)	6.24, 13.58
Subsection 205-25(2)	6.25
Subsection 205-25(3)	6.26, 13.60
Subsection 205-25(4)	6.27, 13.61
Subsection 205-25(5)	6.28, 13.62
Paragraph 205-30(a)	13.71
Paragraph 205-30(b)	13.72
Paragraph 205-30(c)	13.73
Subsection 205-35(1)	13.78
Subsection 205-35(2)	13.80
Subsection 205-35(3)	13.81
Subsection 205-35(4)	13.85
Section 205-40	3.114, 9.62
Subsection 205-40(5)	13.86
Section 300-5	11.57, 13.89

## **Australian Charities and Not —for profits Commission (Consequential and Transitional) Bill 2012**

### **Schedule 1: Application and transitional provisions**

<i>Bill reference</i>	<i>Paragraph number</i>
Item 2	14.8
Item 3	14.11, 15.41
Item 4	14.13, 15.41
Subitem 5(1)	14.20
Subitem 5(2)	14.21
Subitem 5(3)	14.22
Item 6	14.16, 15.40
Item 7	14.27, 14.28
Subitem 8(1)	14.36
Subitem 8(2)	14.38
Subitem 9(1) and note	14.39, 14.41
Subitem 9(2)	14.43, 14.50
Subitem 9(3)	14.43, 14.50
Subitem 9(4) and note	14.44, 14.50
Subitem 10	14.34
Subitem 10(4)	14.30
Item 11	14.45
Subitem 11(1)	14.46
Subitem 11(2)	14.48
Item 12	14.55
Item 13	14.57
Item 14	14.65
Paragraph 14(d)	14.66
Item 15	14.74



## Schedule 2: References to charities etc

<i>Bill reference</i>	<i>Paragraph number</i>
Part 1	15.23, 15.25
Items 1 to 3	15.47
Part 2	15.21
Parts 3, 4 and 6	15.23
Part 7	15.21
Items 26 to 30	15.45
Item 40	15.46
Items 131 to 134	15.51
Items 142 and 148	15.68

## Schedule 3: Amendments consequential on the establishment of the ACNC

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1	15.52
Item 2	15.58
Part 3	15.49, 15.69, 15.70
Items 20 to 23	15.77
Item 32	15.72

## Schedule 5: Other amendments

<i>Bill reference</i>	<i>Paragraph number</i>
Items 1 to 4	15.59



