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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on behalf of the Government

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

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Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
ABN	Australian Business Number
ACNC	Australian Charities and Not-for-profits Commission
ACNC Bill	Australian Charities and Not-for-profits Commission Bill 2012
ACNC Commissioner	Australian Charities and Not-for-profits Commission Commissioner
Consequential and Transitional Bill	Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012
DGR	deductible gift recipient
NFP	not-for-profit
RIS	Regulation Impact Statement
SES	Senior Executive Service

General outline and financial impact

Amendments

The amendments to the Australian Charities and Not-for-profits Commission Bill 2012 (the ACNC Bill) seek to:

- protect the independence of registered entities by ensuring that the governance standards cannot prevent or constrain a registered charity from undertaking important advocacy functions;
- make the Government's commitment to consultation on the governance standards an express requirement in the ACNC Bill;
- allow *basic religious charities* to operate deductible gift recipient funds, authorities or institutions that generate annual revenue of less than \$250,000, without the need to obtain a separate Australian Business Number;
- streamline the process for providing notifications about changes to governance standards for multiple registered entities using the approved form; and
- make other technical corrections.

The amendments to the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 seek to:

- ensure the ACNC Commissioner must accept specified reports lodged under the *Schools Assistance Act 2008* as meeting the annual financial reporting obligations under the ACNC Bill during the transitional period;
- make a number of minor consequential amendments to tables in the *Taxation Administration Act 1953*, which ensure that the Commissioner of Taxation will be able collect administrative penalties on behalf of the ACNC Commissioner; and
- make other technical corrections.

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

Proposal announced: These amendments have not previously been announced.

Financial impact: Nil.

Human rights implications: Nil.

Compliance cost impact: Nil.

Chapter 1

Amendments to the Australian Charities and Not-for-profits Commission Bill 2012

Outline of chapter

- 1.1 This chapter explains the amendments to the Australian Charities and Not-for-profits Commission Bill 2012 (ACNC Bill).
- 1.2 These amendments are explained by way of modification to the explanatory memorandum to the Bill.

Amendments 1 to 4

- 1.3 To ensure the ongoing independence of the sector in any future governance standards, amendments 1 and 2 make a minor change to the objects clause of the Division on governance standards to ensure that the standards are to be developed in accordance with the objects of this ACNC Bill, which include, amongst other things, to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector.
- 1.4 Amendment 3 adds a sub-heading to the ACNC Bill to make it easier to read.
- 1.5 Amendment 4 ensures that the governance standards cannot prevent or constrain a registered charity from engaging in political advocacy for its charitable purpose, except where such advocacy is illegal (from an Australian perspective).
- 1.6 This will protect the independence of registered entities from inappropriate Government interference, and ensure them sufficient autonomy in carrying out their operations by ensuring the governance standards cannot limit a registered entity's ability to make its own decisions on how to best meet its mission without undue influence and control from the Commonwealth Government and its agencies.

1.7 Replace paragraphs 5.40 and 5.41 of the Explanatory Memorandum with the following:

5.40 The governance standards cannot prevent a registered charity from undertaking an activity where that activity furthers, or is in aid of, its purpose, and that activity is advocating or attempting to change the law or government policy except where that activity is in breach of an Australian law [*Subsection 45-10(6)*]. This will protect the independence of registered entities from inappropriate Government interference, and ensure them sufficient autonomy in carrying out their operations by ensuring the governance standards cannot limit a registered entity's ability to make its own decisions on how to best meet its mission without undue influence and control from the Commonwealth Government and its agencies.

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

Amendments 5 and 6

1.8 On 17 May 2012, the Government announced that it would progress the detailed contents of the governance standards and reporting requirements by regulation, to enable further public consultation on these issues to occur.

1.9 To make this commitment to consultation explicit, a provision has been added to the ACNC Bill.

1.10 This amendment reaffirms the Government's prior commitments to publicly consult on the governance and external conduct standards. The consultation process will inform the development and content of these standards.

1.11 Replace paragraph 5.10 of the explanatory memorandum with the following:

5.10 The ACNC 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. The Government must publicly consult on any governance standards (or any material changes to the governance standards) prior to them being registered on the Federal Register of Legislative Instruments.

1.12 Replace paragraphs 5.31 and 5.32 of the explanatory memorandum with the following:

5.31 The Governor-General may make regulations establishing governance standards [*Subsection 45-10(1)*]. These standards must be prospective see subsection 12(2) of the *Legislative Instruments Act 2003*.

5.32 The Government must publicly consult on any governance standards (or any material changes to the governance standards) prior to them being registered on the Federal Register of Legislative Instruments. Before the Governor-General considers making a regulation relating to the governance standards, the Minister must be satisfied that:

- appropriate consultation has been undertaken with:
 - the not-for-profit sector (including through entities that represent parts of the sector); and
 - entities that have expertise in fields relevant to the proposed regulation; and
 - entities that are likely to be affected by the proposed regulation; and
- relevant input received as part of that consultation has been considered and adequately taken into account.

The Government's consultation process could involve providing relevant entities with notifications inviting them to make submissions by a specified date, or to participate in public hearings. The fact that consultation does not occur, or that input is not taken into account, does not affect the validity or enforceability of the regulation. These changes replace the more general consultation requirements within Part 3 of the *Legislative Instruments Act 2003*. [*Subsection 45-15*]

1.13 Replace paragraph 5.54 of the explanatory memorandum with the following:

5.54 The Governor-General may make regulations establishing external conduct standards [*Subsection 50-10(1)*]. Before the Governor-General considers making a regulation relating to the external conduct standards, the Minister must be satisfied that:

- appropriate consultation has been undertaken with:
 - the not-for-profit sector (including through entities that represent parts of the sector); and
 - entities that have expertise in fields relevant to the proposed regulation; and
 - entities that are likely to be affected by the proposed regulation; and
- relevant input received as part of that consultation has been considered and adequately taken into account.

The Government's consultation process could involve providing relevant entities with notifications inviting them to make submissions by a specified date, or to participate in public hearings. The fact that consultation does not occur, or that input is not taken into account, does not affect the validity or enforceability of the regulation. These changes replace the more general consultation requirements within Part 3 of the *Legislative Instruments Act 2003*. [*Subsection 50-15*]

Amendment 7

1.14 Replace paragraph 10.36 of the explanatory memorandum with the following:

10.36 The ACNC Commissioner is able to delegate his or her powers or functions in accordance with the Bill. The delegation must be in writing to an SES employee, or an acting SES employee, that are engaged under the *Public Service Act 1999* and made available to ACNC Commissioner by the Commissioner of Taxation. [*Subsection 115-55(1)*]

1.15 Replace paragraph 10.43 and 10.44 of the explanatory memorandum with the following:

10.43 This Bill does not displace the existing common law duty of employees to comply with lawful and reasonable directions by the employer (the Commissioner of Taxation in relation to APS staff provided to the ACNC Commissioner), 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 in relation to the ACNC Commissioner carrying out functions under the ACNC Bill.

Amendment 8

1.16 Replace paragraphs 13.19 to 13.24 of the explanatory memorandum with the following:

13.19 The entity must give the declaration to the agent [*Subsection 190-25(2)*]. 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)*]

13.20 A determination made by the ACNC Commissioner may specify different periods for different classes of entities.

[*Subsection 190-25(4)*]

13.21 An entity must produce the declaration or copy if requested to do so within that period by the ACNC Commissioner.

[*Subsection 190-25(5)*]

13.22 The agent must not give the document to the ACNC Commissioner before the entity makes the declaration [Subsection 190-25(6)]. The entity must sign the declaration. [Subsection 190-25(7)]

13.23 The declaration requirements in Sections 190-25 and 190-30 of the ACNC Bill do not apply where:

- a registered entity (or the lodging entity) functions as an agent for another registered entity;
- the lodging entity has the authority to amend the governing rules of the other registered entity; and
- the return, notice, statement, application or other document submitted by the lodging entity relates to that amendments which the lodging entity has the authority to make.

[Sections 190-40]

13.24 Providing an exemption from the declaration requirements in certain circumstances addresses concerns raised by stakeholders with unique governance structures, and will minimise compliance costs associated with the regulatory obligations in the ACNC Bill.

1.17 Replace paragraph 13.25 with:

13.25 If an agent gives a document to the ACNC Commissioner in the approved form on behalf of another entity, and the agent is not exempt from complying with the requirements in section 190-30 (see paragraphs 13.23 and 13.24 of this explanatory memorandum), 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]

Amendment 9

1.18 Amendment 9 allows a *basic religious charity* to operate deductible gift recipient funds, authorities or institutions that generate annual revenue of less than \$250,000, without the need to obtain a separate Australian Business Number (ABN).

1.19 Replace paragraphs 13.83 and 13.84 with the paragraphs below.

13.83 In the case where a basic religious charity operates one or more DGR funds, authorities or institutions, and the total revenue generated by the DGR funds, authorities or institutions is less than \$250,000, the entity would be considered a basic religious charity.

13.84 A basic religious charity which operates one or more DGR funds, authorities or institutions that generate more than \$250,000 in revenue would be required to separate the DGR funds, authorities or institutions into a separate entity if the charity wishes to be considered a basic religious charity.

Chapter 2

Amendments to the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012

Outline of chapter

- 2.1 This chapter explains the amendments to the Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Bill 2012 (Consequential and Transitional Bill).
- 2.2 These amendments are explained by way of modification to the explanatory memorandum to the Bill.

Amendments 1 to 3

- 2.3 The Consequential and Transitional Bill provides the Australian Charities and Not-for-profits Commission Commissioner (ACNC Commissioner) with the discretion to accept reports, statements and other documents given under an Australian law to other Australian government entities, as satisfying the reporting obligations under the Bill [*Schedule 1, item 10 of the Consequential and Transitional Bill*]. In exercising this discretion, the Commissioner must have regard to certain matters identified in paragraph 14.33 of the explanatory memorandum. The purpose of this transitional arrangement is to enable the ACNC Commissioner to address potential reporting duplication during the process of establishing the ACNC as a one-stop shop regulator. It applies until the 2014-15 financial year, or a later financial year prescribed by the regulations.
- 2.4 Amendment 1 to the Consequential and Transitional Bill adds a sub-heading for ease of reference.
- 2.5 Amendment 2 to the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 provides that a report (or reports) given under section 24 of the *Schools Assistance Act 2008* that covers the financial operations of a registered entity for a financial year must be accepted by the ACNC Commissioner as meeting the annual financial reporting obligations under Subdivision 60-C or 60-D of the ACNC Bill 2012.

2.6 Amendment 3 allows a substituted accounting period to be adopted in relation to the report (or reports).

2.7 These amendments remove the discretion of the ACNC Commissioner to accept the specified reports given under the *Schools Assistance Act 2008*, and instead require the ACNC Commissioner to accept the report (or reports), irrespective of the criteria listed in subitem 10(2) in Schedule 1 to the Consequential and Transitional Bill. The amendment applies only in relation to annual financial reporting and does not apply to annual information statements.

2.8 These amendments will provide greater certainty that non-government schools will not be subject to reporting duplication during the process of establishing the ACNC.

2.9 Replace paragraph 14.32 of the explanatory memorandum with the following:

14.32 Charitable Indigenous corporations are an example of a class of entity that are intended to benefit from the exercise of the discretion of the ACNC Commissioner. In the case of non-government schools, however, the ACNC Commissioner has no discretion in respect of a report (or reports) lodged under section 24 of the *Schools Assistance Act 2008*, and must accept such a report (or reports) as meeting the annual financial reporting obligations under Subdivision 60-C or 60-D of the Consequential and Transitional Bill. This will provide greater certainty that non-government schools will not be subject to reporting duplication during the process of establishing the ACNC.

Amendments 4 and 5

2.10 The Consequential and Transitional Bill provides that administrative penalties payable under the ACNC Bill are tax debts that are collectable by the Commissioner of Taxation behalf of the Commonwealth.

2.11 Amendments 4 and 5 make a number of minor consequential amendments to tables in the *Taxation Administration Act 1953*, which ensure that the Commissioner of Taxation will be able collect administrative penalties under the taxation laws general collection and recovery provisions.

2.12 Replace paragraph 15.50 of the explanatory memorandum with the following:

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*. The ACNC Consequential and Transitional Bill also amend section 8AAB of the *Taxation Administration Act 1953* to ensure that unpaid administrative penalties issued by the ACNC accrue general interest charge; and subsection 250-10(2) in Schedule 1 to the *Taxation Administration Act 1953* to clarify that administrative penalties issued by the ACNC, and related general interest charge, are treated in the same way as tax-related liabilities.

Amendment 6

2.13 The amendment replaces the reference to subsection 601HD(2), with a reference to subsection 601DH(2). This amendment corrects a typographical error.

