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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

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
DGR	deductible gift recipient
NFP	Not-for-profit
the Bill	Australian Charities and Not-for-profits Commission Bill 2012

General outline and financial impact

Amendments

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

- allow the Australian Charities and Not-for-profits Commission (ACNC) Commissioner to decline to include or remove the details of warnings from the register, where the release of the information may cause detriment, the entity has acted in good faith, and the matter has been resolved;
- add clarification that the governance standards will be focussed on outcomes and will specify principles as to how the registered entity must achieve those outcomes, including proportional standards that recognise the size and nature of the registered entity;
- provide clarification that consultation on the governance and external conduct standards should involve public consultation, and that such consultation should be assisted through facilitation by the ACNC Commissioner;
- provide mechanisms for additional Parliamentary scrutiny in relation to the development of the governance and external conduct standards including:
 - requiring that each provision of the regulations (*the standards*) cannot commence without both Houses of Parliament passing a motion approving each of the standards:
 - : this is to allow Parliament to effectively ‘disallow’ any one governance or external conduct standard, rather than requiring them to decide to either disallow them all or not disallow them all; and
 - if Parliament decides not to endorse or dis-endorse a particular standard (or disallow the regulations

containing the standards) within the disallowance period, there will be an automatic commencement of any un-actioned standards on the day after the last day on which the regulation could be disallowed by either House;

- add an objects clause to the reporting framework which sets out the intent and purpose of the reporting framework — namely introducing a proportional framework to reduce unnecessary regulatory obligations, alleviating the need for information to be provided to multiple government agencies and promoting transparency and accountability of registered entities;
- add a requirement that the ACNC Commissioner include, in the written notification to suspended or removed responsible entities, an explanation of the strict liability offences which apply to entities that breach the prohibition on managing registered entities and the obligations in relation to providing books and property to new responsible entities;
- clarify that the annual report of the ACNC Commissioner will include an assessment of how the ACNC Commissioner has promoted the objects of the Bill, including the reduction of unnecessary regulatory obligations;
- provide for the maximum annual revenue for a deductible gift recipient fund (DGR fund) operated by a basic religious charity to be increased from \$250,000, in line with changes to the thresholds for small registered entities; and
- simplify the transition of entities to ACNC regulation where entities are operating a public benevolent institution (or multiple public benevolent institutions) or a health promotion charity (or multiple health promotion charities) and where the whole of the entity is not such an institution (that is, where the institution is notionally operated or conducted in-house, usually by an unincorporated religious institution) to ensure these entities transition appropriately to the ACNC, and both the operated institution of the entity, and the remainder of the entity keep the existing concessions they currently have access to.

Date of effect: The ACNC will commence operations when the Bills receive Royal Assent.

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 (the Bill).
- 1.2 These amendments are explained by way of modification to the revised explanatory memorandum to the Bill.

Additional information sought by the Senate Standing Committee on Community Affairs

Public trust and confidence

- 1.3 Add new paragraphs after paragraph 1.87 of the revised explanatory memorandum:

1.87A It is important to note that the concept of public trust and confidence is not used as a test to trigger any of the ACNC regulatory powers or to provide grounds for the revocation of the registration of an entity.

1.87B Rather, the issue of public trust and confidence is one of a list of policy matters that the ACNC Commissioner must consider prior to using any of the enforcement powers or revoking registration. This list of factors also includes considering factors such as what other actions could be taken to remedy contraventions or non-compliance with the Bill and the welfare of members of the community that receive benefits from the entity.

1.87C For example, if a registered entity does not have a charitable purpose, rather it is merely acting as a conduit to fund illegal activities, the ACNC Commissioner may revoke that entity's registration. In making a decision to revoke an entity's registration the ACNC Commissioner would consider all the factors outlined in subsection 35-10(2). This assessment would include considering the fact that the continued registration of this entity may cause a loss of

public confidence which could have a serious negative effect not only on the affected entity but on the sector as a whole. Further, an entity's ability to access government funding would be another consideration which may further incline the ACNC Commissioner to revoke registration.

1.87D However, in a case where there have been a series of minor breaches of the requirements of the Bill, due to a significant changeover in staffing, the fact that this would not have a negative effect on public trust and confidence would be a factor which would make it less likely that the ACNC Commissioner would need to take enforcement action.

1.87E Detailed examples of how the thresholds that must be met and the factors that must be considered are provided in Chapter 3 — Registration and Chapter 9 — Education, compliance and enforcement, in particular see examples 3.11 to 3.16 and 9.5 to 9.8.

Meaning of 'more likely than not'

1.4 Add the following new paragraphs after paragraph 3.89 of the revised explanatory memorandum:

3.89A The House of Representatives Standing Committee on Economics considered the issue of likelihood standards in relation to the ACNC Bill and noted that varying degrees of probability are required in different areas of the general law. For example, in civil matters a 50 per cent test is sufficient. In criminal matters, 'beyond reasonable doubt,' which is well above a 50 per cent probability, is often applied.

3.89B Different standards of proof are commonly used throughout Commonwealth legislation and the test of 'more likely than not' has been applied in the context of a number of Commonwealth and state laws, most notably, competition law. There are several areas of competition law which use different types of commonly understood likelihood tests. For example, the Australian Consumer Law prohibits conduct by a corporation that is misleading or deceptive, or would be likely to mislead or deceive. The High Court has recently provided guidance on this 'more likely than not' test and has set out the meaning and operation of such tests.¹

1 For example, see section 18 in Schedule 2 to the *Competition and Consumer Act 2010* and *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151

1.5 Add the following new paragraphs after paragraph 9.38 of the revised explanatory memorandum:

9.38A The House of Representatives Standing Committee on Economics considered the issue of likelihood standards in relation to the ACNC Bill and noted that varying degrees of probability are required in different areas of the general law. For example, in civil matters a 50 per cent test is sufficient. In criminal matters, ‘beyond reasonable doubt,’ which is well above a 50 per cent probability, is often applied.

9.38B Different standards of proof are commonly used throughout Commonwealth legislation and the test of ‘more likely than not’ has been applied in the context of a number of Commonwealth and state laws, most notably, competition law. There are several areas of competition law which use different types of commonly understood likelihood tests. For example, the Australian Consumer Law prohibits conduct by a corporation that is misleading or deceptive, or would be likely to mislead or deceive. The High Court has recently provided guidance on this ‘more likely than not’ test and has set out the meaning and operation of such tests.²

Upholding the objects of the Bill

1.6 Add a new paragraph after paragraph 10.11 of the revised explanatory memorandum:

10.11A The general administration of the law, includes upholding and furthering the objects of the Bill. The objects of the Bill are explained in detail in Chapter 1 — Background. [*Subsection 110-5(2)*]

Volunteer directors of unincorporated associations

1.7 Add the following new paragraph after paragraph 13.177 of the revised explanatory memorandum:

13.177A As part of its role, the ACNC will provide education and guidance to relevant responsible entities, including volunteer directors of unincorporated associations, to assist them to meet the requirements under the Bill. This is consistent with the ACNC Commissioner’s general approach of resolving compliance issues primarily through

² For example, see section 18 in Schedule 2 to the *Competition and Consumer Act 2010* and *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151

education, rather than heavy handed enforcement action. This approach is outlined in the ACNC's Implementation Report, released in June 2012.

Amendments

Amendment 1 — warning notices

1.8 Add the following new paragraph after paragraph 4.32 of the revised explanatory memorandum.

4.32A The Bill allows the ACNC Commissioner to decline to include or to remove the details of warnings from the ACN Register where:

- the release of the information may cause detriment to the registered entity or an associated individual;
- the registered entity has not acted in bad faith in relation to the notice or in relation to the contravention or non-compliance it was issued in relation to;
- the contravention or non-compliance has been resolved; and
- the removal of the information would not conflict with the objects of the Bill or the public interest test.

4.32B This ensures that information is not required to be published on the ACN Register (or can be removed from the register) where the matters have been resolved and the information being included on the register may have unintended and adverse ongoing consequences on the registered entity or an associated individual.

Amendments 2 to 8 and 12 to 14 — regulation-making power for governance standards and external conduct standards

1.9 Add the following new paragraph after paragraph 5.42 of the revised explanatory memorandum:

5.42A The standards may require a registered entity to achieve specified outcomes, without specifying how the entity is to achieve those outcomes. Alternatively, the standards may specify principles as to how the registered entity must achieve those outcomes. Those principles are to reflect and recognise different sizes of registered entity, the amount and nature of contributions to a registered entity and

the nature of the activities undertaken by the registered entity in pursuit of its purposes. *[Subsection 45-10(2A)]*

1.10 Governance standards are proposed to generally be principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation.

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

1.12 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.

1.13 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.

1.14 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.

1.15 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.

1.16 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.

1.17 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.

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

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

1.20 To alleviate concerns of the not-for-profit (NFP) sector that the governance standards may allow for an inappropriate intrusion into the independence of a registered entity by requiring a registered entity to act or not act in a certain way outside of regulating an organisation's governance framework, the Bill has been altered to remove the words 'act, or not act'. The governance standards will still be able to properly regulate the organisational management processes of a registered entity, for example, by requiring an annual general meeting to be undertaken, by preventing a registered entity from engaging in serious criminal conduct or by preventing certain unfit individuals from being responsible entities of a registered entity.

1.21 The governance standard framework reflects the unique structures, funding arrangements and goals of NFP entities and will support and sustain a robust, vibrant, independent and innovative Australian NFP sector.

1.22 The governance standards will not reduce or remove the independence of registered entities or limit a registered entity's ability to make its own decisions on how to best meet its mission without undue influence from Government.

1.23 Replace paragraph 5.33 of the revised explanatory memorandum with the following:

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;

achieving specific outcomes (through the application of specified principles if provided); 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)]

1.24 Replace paragraph 5.55 of the revised explanatory memorandum with the following:

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;

achieving specified outcomes (through the application of specified principles if provided); 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)]

Amendments 11 and 17 — Parliamentary scrutiny of standards

1.25 Add the following new paragraphs after paragraph 5.32 of the revised explanatory memorandum:

5.32A Before they can commence, each provision of the regulations (*each standard*) must be endorsed by a resolution of each House of Parliament (subject to timing limitations discussed below). If either House of Parliament by motion refuses to endorse (dis-endorses) any standard that standard will then never commence.

5.32B Under the *Legislative Instruments Act 2003*, either House of Parliament may disallow the regulations in full (that is, all the standards contained within those regulations). The special Parliamentary scrutiny of standards provisions under the Bill do not displace those existing powers.

5.32C Giving either House of Parliament the power to dis-endorse a provision of the regulations, allows Parliament to effectively disallow any one governance standard, rather than requiring them to decide to either disallow all the standards (so no standards apply) or allow them to all apply, even where the House may not agree with all of the standards included in an amending regulation.

5.32D A standard does not commence until the earlier of:

- the day after both Houses of Parliament have passed a resolution approving the standard; or
- if Parliament chooses not to endorse or dis-endorse a particular standard within the disallowance period, the day after the disallowance period ends.

5.32E This allows the standards to be flexible and responsive to the needs of the sector through prescription in regulations, while preventing the inappropriate use of the regulation-making power by ensuring an appropriate level of Parliament oversight of the standards setting process. [Section 45-20]

1.26 Add the following new paragraphs after paragraph 5.54 of the revised explanatory memorandum:

5.54A Before they can commence, each provision of the regulations (*each standard*) must be endorsed by a resolution of each House of Parliament (subject to timing limitations discussed below). If either House of Parliament by motion refuses to endorse (dis-endorses) any standard that standard will then never commence.

5.54B Under the *Legislative Instruments Act 2003*, either House of Parliament may disallow the regulations in full (that is, all the standards contained within those regulations). The special Parliamentary scrutiny of standards provisions under the Bill do not displace those existing powers.

5.54C Giving either House of Parliament the power to dis-endorse a provision of the regulations, allows Parliament to effectively disallow any one governance standard, rather than requiring them to decide to either disallow all the standards (so no standards apply) or allow them to all apply, even where the House may not agree with all of the standards included in an amending regulation.

5.54D A standard does not commence until the earlier of:

- the day after both Houses of Parliament have passed a resolution approving the standard; or
- if Parliament chooses not to endorse or dis-endorse a particular standard within the disallowance period, the day after the disallowance period ends.

5.54E This allows the standards to be flexible and responsive to the needs of the sector through prescription in regulations, while preventing the inappropriate use of the regulation-making power by ensuring an appropriate level of Parliament oversight of the standards setting process. [Section 50-20]

Amendments 9, 10, 15 and 16 — consultation on standards

1.27 Replace paragraph 5.32 of the revised explanatory memorandum with the following:

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);
 - entities that have expertise in fields relevant to the proposed regulation;
 - the ACNC Commissioner;
 - 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 consultation with the public, providing relevant entities with notifications inviting them to make submissions by a specified date, and/or to participate in public hearings and involve consultation facilitated by the ACNC Commissioner. 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]

1.28 Replace paragraph 5.54 of the revised 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);

- entities that have expertise in fields relevant to the proposed regulation;
 - the ACNC Commissioner;
 - 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 public consultation, providing relevant entities with notifications inviting them to make submissions by a specified date, or to participate in public hearings or involve consultation facilitated by the ACNC Commissioner. 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 18 — reporting and record keeping

1.29 Add the following new paragraph after paragraph 6.3 of the revised explanatory memorandum:

6.3A The Bill sets out the reporting and record keeping obligations of registered entities. The Objects of this framework are to promote the transparency and accountability of registered entities, and to reduce the reporting obligations of registered entities under other Australian laws, for example, by alleviating the need for information to be provided to multiple government agencies.

Amendments 19 to 22 — suspension and removal written notice

1.30 Add the following new paragraph after paragraph 9.216 of the revised explanatory memorandum:

9.216A To ensure suspended and removed entities understand their ongoing obligations and to prevent them from unknowingly acting in breach of their obligations, the written notice must also provide an explanation of the strict liability offences which apply to suspended or removed entities that breach the prohibition on managing the registered entity, as explained in paragraphs 9.241 to 9.250. The notice must also explain the strict liability offences in relation to former trustees' obligations relating to books, identification of

property and transfer of property, as explained in paragraphs 9.283 to 9.297.

Amendments 23 and 24 — annual report

1.31 Add the following new paragraphs after paragraph 10.56 of the revised explanatory memorandum:

10.56A The annual report will include an assessment of how the Commissioner has promoted the objects of the Act, including the reduction of unnecessary regulatory obligations.

10.56B The ACNC has undertaken to develop and make public a red-tape reduction timeline and plan. The ACNC's annual report will also provide details of the performance of the ACNC against this timeline.

10.56C The annual report will also include reporting on the development of memoranda of understanding and other arrangements with other Australian government agencies, and how these arrangements are operating to reduce unnecessary regulatory obligations.

Amendment 25 — basic religious charities

1.32 Replace paragraph 13.84 of the revised explanatory memorandum with:

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. The Bill provides that this threshold amount can be raised over time, in line with regulations made for the purposes of the small registered entity definition.

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 revised explanatory memorandum to the Bill.

Amendments — Transitional arrangements

2.3 There are currently entities which are endorsed to *operate* a public benevolent institution or a health promotion charity that need to be properly transitioned into the ACNC framework in relation to the institution which they operate. These arrangements need to be compared with the usual practice of entities that seek entity endorsement as a public benevolent institution or a health promotion charity.

2.4 The complexity with this arrangement is that the public benevolent institution or a health promotion charity which is operated by another entity is entitled to concessions that the entity is unlikely to be able to access itself. While the entity operating the public benevolent institution or a health promotion charity is likely to be separately required to register with the ACNC to retain its own concessions, it will also need to seek special registration in respect of the public benevolent institution or a health promotion charity it operates.

2.5 These amendments will simplify the initial transition of entities to the ACNC where entities are operating a public benevolent institution or a health promotion charity where the whole of the entity is not such an institution (that is, where the institution is notionally operated or conducted in-house, usually by an unincorporated religious institution). These amendments will ensure these entities transition appropriately to the ACNC, and both the operated institution of the entity, and the remainder of the entity (which may include multiple public benevolent

institutions or health promotion charities) keep the existing concessions they currently have access to.

2.6 These amendments will incorporate a further transitional provision for operated public benevolent institutions or health promotion charities which allows for the transfer to ACNC regulation, entities which are operating a public benevolent institution or health promotion charity in instances where the whole of the entity is not itself a public benevolent institution or a health promotion charity.

2.7 This transition is achieved by treating the operated public benevolent institution, or public benevolent institutions if there are more than one, or health promotion charity (or multiple health promotion charities) of the entity to be a separate entity for taxation and ACNC purposes. The operated public benevolent institution or institutions or health promotion charity or charities will be automatically allocated an ABN by the Australia Business Registrar, registered by the ACNC as a charity with either sub-type public benevolent institution or sub-type health promotion charity and endorsed by the Commissioner of Taxation for access to an income tax exemption, goods and services tax concessions, fringe benefits tax concessions and deductible gift recipient status in line with their existing endorsed entitlements.

2.8 This creates a seamless transition for these operated public benevolent institutions and health promotion charities as they will continue to operate as separate and distinct parts of their 'parent entity' with an independent taxation treatment.

2.9 A regulation making power will enable further minor modifications to be made to the ACNC Bill and taxation law (on a transitional basis) to ensure the seamless transition should any unintended consequences arise for these complex charitable structures. *[Amendments 1 to 11, items 3A to 4E in Schedule 1 and items 44A, 56A, 58, 68, 68A, 68B and 68C in Schedule 2 to the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012]*