

The Senate

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Economics  
Legislation Committee

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

June 2014

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ISBN 978-1-76010-016-2

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Printed by the Senate Printing Unit, Parliament House, Canberra.

# Senate Economics Legislation Committee

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# Chapter 1

## Introduction

1.1 On 27 March 2014, the Senate referred the provisions of the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 (the bill) to the Senate Economics Legislation Committee for inquiry and report by 16 June 2014.

1.2 The Bill would repeal the *Australian Charities and Not-for-profits Commission Act 2012* (the Act), thereby abolishing the Australian Charities and Not-for-profits Commission (the ACNC).

### Conduct of the inquiry

1.3 The committee advertised the inquiry on its website and wrote to relevant stakeholders and other interested parties inviting submissions. The committee received 155 submissions, which are listed at Appendix 1; and additional information, which is listed at Appendix 2.

1.4 The committee held a public hearing in Canberra on 23 May 2014. The names of the witnesses that gave evidence are at Appendix 3.

### Background

1.5 The *Australian Charities and Not-for-profits Commission Act 2012* established a new national regulatory framework for the not-for-profit (NFP) sector and created a new independent statutory office, the Australian Charities and Not-for-profits Commission (ACNC) as the Commonwealth level regulator for the sector.<sup>1</sup>

1.6 Previously, the ATO had responsibility for determining charitable status and also for determining whether or not NFP organisations were eligible for tax exemptions and concessions. These included arrangements such as fringe benefits tax (FBT), deductible gift recipient (DGR) status, refundable franking credits and goods and services tax (GST) concessions.<sup>2</sup> The Australian Securities and Investments Commission (ASIC) was responsible for regulating NFP organisations that were companies limited by guarantee.<sup>3</sup>

1.7 The ACNC was intended to create a 'one-stop shop' for ACNC registration, tax concessions, and for accessing Australian Government services and concessions.

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1 Explanatory Memorandum, *Australian Charities and Not-for-profits Commission Bill 2012 and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*, Summary of regulation impact statement, p. 4.

2 Revised Explanatory Memorandum, *Australian Charities and Not-for-profits Commission Bill 2012, Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*, paragraphs 1.19–1.20.

3 Revised Explanatory Memorandum, *Australian Charities and Not-for-profits Commission Bill 2012, Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*, paragraphs 1.18 and 15.49.

Registered entities involved in a range of activities would only have to apply and report to the ACNC. According to the Explanatory Memorandum for the original bill:

The move to the 'report-once, use-often' approach would reduce the compliance burden associated with duplicative, ad hoc and inconsistent reporting.<sup>4</sup>

1.8 During the two decades prior to the enactment of the Act, many inquiries recommended the establishment of a single national regulator dealing only with not-for-profits.<sup>5</sup> Concerns about the then-existing state of regulation included the following:

- (a) the lack of specialist regulators, resulting in regulation that did not take into account the special nature of not-for-profits;
- (b) the limited resources devoted to not-for-profit regulation, resulting in inadequate oversight;
- (c) lack of public transparency;
- (d) the complexity and incoherency of the patchwork of regulations applying to not-for-profits.

1.9 In his second reading speech, the minister referred to the six separate reviews of the charitable and NFP sector that had been conducted over the previous 17 years. They included the comprehensive 2001 report of the inquiry into the definition of charities and related organisations; the 2009 review into Australia's future tax system; and the Productivity Commission's 2010 report, *Contribution of the not-for-profit sector*. He noted that the reviews recommended 'simplifying and harmonising taxation and regulation for the sector, with a national regulator and a statutory definition of charity'.<sup>6</sup>

## The ACNC

1.10 The Act established the ACNC in 2013. The almost 100 staff of the ACNC<sup>7</sup> are made available by the Australian Taxation Office (the ATO), but are subject to the direction of the Commissioner of the ACNC.<sup>8</sup>

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4 Revised Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, p. 4.

5 Australian Charities and Not-for-profits Commission, *Submission 95*, Appendix A, outlines these inquiries.

6 The Hon David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation, *House of Representatives Committee Hansard*, 23 August 2012, p. 9722.

7 Australian Charities and Not-for-profits Commission informed the committee that as at 23 May 2014, the ACNC had 94.47 Full Time Equivalent employees. See *Supplementary to Submission 95*, ACNC's comment in attached table, p. 1. See also *Proof Committee Hansard*, 23 May 2014, p. 14.

8 Section 120-5 of the *Australian Charities and Not-for-Profits Commission Act 2012*.

1.11 The objects of the Act are:

- to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
- to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.<sup>9</sup>

1.12 The ACNC registers not-for-profit entities as charities and as subtypes of charities.<sup>10</sup> Registration as a charity or subtype of charity has consequences under many Commonwealth laws. Most significantly, it is a condition for many taxation concessions.<sup>11</sup> There are currently over 60,000 registered charities.

1.13 Once registered, a charity is subject to regulation by the ACNC.<sup>12</sup> Registered charities must comply with the law and with governance standards made under the Act. They must provide information to the ACNC in accordance with the Act, including in the form of an annual information statement. The ACNC maintains the Australian Charities and Not-for-profits Register (the Register), a detailed public register of registered charities.<sup>13</sup>

1.14 The ACNC has a wide range of powers to deal with registered charities that do not comply with the standards under the Act,<sup>14</sup> including power:

- (a) to compel the giving of information to the ACNC;
- (b) to enter premises to obtain information;
- (c) to warn;
- (d) to give specific directions to charities to address contraventions;
- (e) to require enforceable undertakings;
- (f) to obtain injunctions; or
- (g) to suspend or remove directors or trustees.

1.15 The ACNC also has the statutory function of 'assist[ing] registered entities in complying with and understanding [the] Act, by providing them with guidance and education.'<sup>15</sup>

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9 Subsection 15-5(1) of the *Australian Charities and Not-for-Profits Commission Act 2012*.

10 Part 2-1 of the *Australian Charities and Not-for-Profits Commission Act 2012*.

11 Perhaps the most significant of these concessions is the exemption from income tax under section 50-5 of the *Income Tax Assessment Act 1997*.

12 Chapter 3 of the *Australian Charities and Not-for-Profits Commission Act 2012*.

13 Part 2-2 of the *Australian Charities and Not-for-Profits Commission Act 2012*.

14 Chapter 4 of the *Australian Charities and Not-for-Profits Commission Act 2012*.

15 Subparagraph 15-5(2)(b)(iii) of the *Australian Charities and Not-for-Profits Commission Act 2012*.

## **Other regulation applying to charities**

1.16 The Commonwealth does not have plenary legislative power in relation to charities. As such, the provisions of the Act do not apply to all charities in all circumstances, and most charities need to comply with a variety of Federal and State laws about not-for-profits. This includes the laws that provide for the creation of the entities, such as the Corporations Law and State and Territory associations incorporations and trust laws.

1.17 Charities also need to comply with various laws that regulate their specific activities, such as:

- (a) State and Territory fundraising laws;
- (b) government grant rules; and
- (c) taxation law.<sup>16</sup>

1.18 While Commonwealth law has made some provision for reducing the multiplicity of regulation faced by charities,<sup>17</sup> this is far from complete.

## **Provisions of the bill**

### ***Repeal of the Act***

1.19 Part 1 of Schedule 1 to the bill repeals the Act.

1.20 Abolition of the ACNC was an election commitment of the current Government.<sup>18</sup>

### **Replacement arrangements**

1.21 Part 2 of the Schedule provides for the following minor transitional matters:

- (a) the transfer of the ACNC's records to a 'successor Agency';
- (b) the continuation of investigations by the Commonwealth Ombudsman;
- (c) maintaining the confidentiality of information disclosed for the purposes of the Act;
- (d) the preparation of the ACNC's final annual report by the successor Agency.

1.22 The bill does not identify the successor Agency; instead, it provides for the Minister to specify this agency by disallowable legislative instrument.<sup>19</sup> The Explanatory Memorandum states that:

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16 ACNC *Submission 95*, p. 4 elaborates on this point.

17 For example, Part 1.6 of the *Corporations Act 2001* provides that some provisions of that Act do not apply to charities regulated by the ACNC.

18 Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014, Explanatory Memorandum, p. 1.

19 Item 3 of Schedule 1 to the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014.

It is intended that regulatory functions previously transferred to the ACNC from the ATO and ASIC will be returned to those bodies. In place of the ACNC, broad support for the sector will be provided by a new National Centre for Excellence.<sup>20</sup>

1.23 Clearly, the arrangements replacing the ACNC will require many more consequential amendments and transitional provisions. According to the Explanatory Memorandum, these will be provided for in the Australian Charities and Not-for-profits Commission (Repeal) (No. 2) Bill (the No. 2 bill), which has not yet been introduced. The No. 2 bill will have to deal with such matters as what agency will now endorse not-for-profit organisations as charities, and to what extent the Commonwealth will continue to regulate the governance of charities.

1.24 It is not yet clear what will be the functions of the National Centre for Excellence.

### **Commencement**

1.25 The operative provisions of the bill will not commence until enactment of the No. 2 bill.<sup>21</sup>

### **Financial impact**

1.26 The Explanatory Memorandum for the bill states that 'As the bill does not take effect until [the No. 2 bill] is passed by the Parliament, there are no direct financial impacts to be quantified.'

### **Regulatory Impact Statement**

1.27 The Explanatory Memorandum includes a regulation impact statement. The statement discusses the effect of the Act and the establishment of the ACNC on not-for-profits. On the other hand, it says little about the effect of the abolition of the ACNC, or of details on the alternative arrangements that will be implemented by the No. 2 bill.

### **Acknowledgements**

1.28 The committee thanks all those who participated in, and assisted the committee with, the inquiry.

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20 Regulatory Impact Statement, p. 3.

21 Clause 2 of the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014.



# Chapter 2

## Views on the bill

2.1 The Act establishing the ACNC clearly states the objectives of the legislation which are:

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

2.2 The legislation sought to achieve these objectives by establishing a national regulatory framework for not-for-profit entities that reflected the unique structures, funding arrangements and goals of such entities. It also established the Commissioner of the ACNC, who is responsible for:

- registering entities as not-for-profit entities according to their type and subtypes;
- administering the national regulatory framework; and
- assisting registered entities in complying with and understanding this Act, by providing them with guidance and education.<sup>1</sup>

2.3 One of ACNC's statutory objects is to 'promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector'.<sup>2</sup> In this chapter, the committee considers the proposed abolition of the ACNC in the context of its objectives and with a particular focus on the reduction of unnecessary regulatory obligations.

### **Purpose of the bill**

2.4 When introducing the legislation, the Minister for Social Services (the Minister) made clear that the abolition of the commission was an election commitment and part of the government's effort to 'remove the regulatory impost on the sector as soon as possible', to ensure that organisations were not reporting unnecessarily. With regard to the broader aim, the minister later explained that the government was:

Implementing a broad deregulation agenda to boost productivity by removing any excessive, unnecessary and overly complex red and green

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1 Section 15–5.

2 Australian Charities and Not-for-profits Commission, website, Red tape reduction, [http://www.acnc.gov.au/ACNC/About\\_ACNC/Redtape\\_redu/ACNC/Report/Red\\_tape.aspx?hkey=02c36842-0881-4e67-98ad-0533e728658a](http://www.acnc.gov.au/ACNC/About_ACNC/Redtape_redu/ACNC/Report/Red_tape.aspx?hkey=02c36842-0881-4e67-98ad-0533e728658a)

tape imposed on business, community organisations and individuals by at least \$1 billion a year.<sup>3</sup>

## **Evidence before the committee**

2.1 The committee received evidence from a range of groups and individuals, including:

- (a) a wide variety of charities and peak bodies, including community legal services, health services providers, educators and religious organisations;
- (b) professional firms and organisations; and
- (c) government bodies, including the ACNC.

2.2 Key issues discussed during the inquiry included:

- whether the ACNC Act had increased red tape;
- national harmonisation of regulation of not-for-profits;
- the appropriateness of the powers the Act gives to the ACNC;
- the details to be included in the No. 2 bill; and
- restoring some of the ATO's pre-ACNC responsibilities in relation to charities.

## **Red tape**

2.1 One of the major issues discussed during the inquiry was the effect of the ACNC Act on the burden of red tape on charities. Attention focused particularly, but not exclusively, on charities' reporting obligations. The Minister stated in his second reading speech that:

The commission was established with the intention of being a single reporting point for charities. However, this has not eventuated—the majority of charities continue to provide information to multiple jurisdictions in the course of conducting their business as charities.<sup>4</sup>

2.5 Some submissions claimed that, with the establishment of the ACNC, the reporting burden for many charities had diminished, particularly for those previously regulated by ASIC.

### ***Charities not previously subject to significant reporting obligations***

2.6 The regulatory burden, however, had clearly increased significantly for some charities, particularly charitable will trusts. The Financial Services Council (FSC) informed the committee:

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3 The Hon Kevin Andrews, answer to question No. 41, *House of Representatives Hansard*, 13 May 2014, p. 78.

4 The Hon Kevin Andrews, *House of Representatives Hansard*, 13 May 2014, p. 2,386.

The ACNC regime imposes reporting obligations on the trustees of charitable will trusts that did not exist formerly. The cost of complying with these obligations is a new compliance cost, created by the ACNC, which diverts funds away from charitable purposes.

The ACNC regime imposes specific governance standards on the trustees of charitable trusts that are similar, though not the same, as the governance standards imposed by the Corporations Act on licensed trustee companies in relation to their delivery of all other traditional trustee company services. This results in separate governance requirements for the delivery of exactly the same service...<sup>5</sup>

2.7 The FSC estimated that the cost of complying with the ACNC reporting obligations was between 100-150k per/year, per trustee company member organisation.<sup>6</sup>

2.8 The ACNC responded to these observations:

... charitable trusts are only required to submit basic corporate information and financial reports that they would likely have prepared as part of discharging their trustee duties. The ACNC has worked closely with trustee companies to streamline their submission of information on behalf of multiple charities (through a bulk lodgment process)... there is potential for duplication to be removed over time as the Charity Passport is implemented.<sup>7</sup>

2.9 Mr Robert Fitzgerald, also explained that, more generally:

In the first year some agencies will have experienced some additional compliance burdens especially where they are unincorporated and have not publicly reported before. But this was always anticipated and hence the considerable effort to keep requirements to a level commensurate with the financial size of the organisation. Further, transition arrangements were introduced. Small agencies do not need to have their finances audited or reviewed. Their requirements and impacts are minimal. This is now able to be verified and many assumptions about the cost imposts have proven to be very wide of the mark.<sup>8</sup>

### ***Charities already subject to significant regulation***

2.10 Many of the charities most supportive of the bill were those subject to significant reporting requirements under other legislation, such as universities, schools, hospitals and medical research institutes. For example, Universities Australia (UA) acknowledged that the intention of the ACNC Act was to reduce unnecessary regulatory obligations and minimise duplication of reporting requirements for the not-for-profit sector. It suggested, however, that the reporting obligations imposed on the

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5 *Submission 102*, covering letter.

6 Financial Services Council Ltd, *Submission 102*, Attachment 1, p. [3].

7 Australian Charities and Not-for-profits Commission, *Submission 95*, p. 21.

8 Mr Robert Fitzgerald AM, *Submission 52*, p. 8.

Universities as a result of the Act was inconsistent with this central objective. It stated:

No public interest objective is advanced by the ACNC, imposing additional governance standards obligations on the university sector, which is already more thoroughly and comprehensively regulated by another government agency—the Tertiary Education Quality and Standards Agency (TEQSA).<sup>9</sup>

2.11 Universities Australia noted further that the ACNC required registered entities with annual revenue of over \$250,000 to provide it with annual financial reports. The universities, however, are already required to provide such information to other government departments and agencies. As such, Universities Australia supported this the legislation to abolish the ACNC as it would address UA's concerns on the duplication of regulatory and reporting burdens currently imposed on universities.<sup>10</sup>

2.12 The Australian Catholic Bishops Conference also noted the various reporting obligations they must observe:

Australian Catholic schools already report to multiple agencies in multiple ways, particularly for educational and financial outcomes. They are highly regulated through other instruments which are not necessarily associated with charitable status including a high level of accountability through State and Territory and Australian Government funding arrangements and school registration requirements. In addition, there are significant accountabilities, educational and financial, formalised in the *Australian Education Act 2013* and the *Australian Education Regulation 2013*.<sup>11</sup>

2.13 The Bishops' Conference noted further that charitable hospitals and aged care services were 'subject to a similar level of regulatory scrutiny and public reporting to non-government schools'.<sup>12</sup> Indeed, Catholic Health noted that the ACNC had caused double reporting—double charitable registration requirement and for most charities double annual reporting requirements. It indicated that most charitable associations under this new regime are required to report on their annual activities to two different regulators, whereas prior to the Act they reported to only one. Also, a charitable company is now required to report some regular matters of operation to the ACNC, such as annual activity reports, and other operational details to ASIC, including changes to auditor details. In its experience, the administration of a charitable company was 'clear and straightforward when ASIC was the single regulator' unlike currently where it is 'unclear as to which regulator obligations exist'. It informed the committee:

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9 *Submission 103*, p. 1. According to Universities Australia, 'TEQSA was specifically established to regulate the governance, quality, efficiency and transparency of university services. It actively assesses risk for universities against 'corporate and academic governance' and 'financial viability and safeguards' measures'.

10 *Submission 103*, pp 1–2.

11 *Submission 76*, p. 4.

12 *Submission 76*, p. 5.

...charitable hospitals and aged care services were already subject to significant mandatory financial, governance, quality and safety reporting requirements such that the ACNC would do nothing to enhance 'public trust and confidence' in charitable hospital and aged care service provision.<sup>13</sup>

2.14 The Association of Australian Medical Research Institutes (MRI) similarly drew attention to the regulatory workload imposed under the ACNC regime. It informed the committee that for the medical research institute sector, the ACNC Act had achieved 'no benefit', and had in fact increased the administrative and regulatory burden for many organisations. In its assessment, the ACNC Act had:

- complicated legislation for MRIs—charities that are public companies limited by guarantee were previously regulated by the *Corporations Act 2001*, they are now regulated by the Corporations Act and the ACNC Act;
- complicated the regulatory and reporting arrangements for charities—MRIs that are public companies limited by guarantee formerly reported to the Australian Securities & Investments Commission (ASIC) regarding changes to business and governance details, this reporting is now split between ASIC and the ACNC depending on the nature of the matter;
- been unsuccessful in consolidating and streamlining financial reporting requirements of MRIs (all of which fall into the 'large charity' category)—the transfer of financial reporting for charities that are public companies limited by guarantee from ASIC to the ACNC has meant that the well-established, streamlined reporting arrangements of ASIC have been replaced with less streamlined procedures of the ACNC. For charities that are incorporated entities, they have to double report financial information to both their relevant state/territory government agency and the ACNC.<sup>14</sup>

2.15 The Association also contended that the ACNC charity passport, which was intended to reduce duplicative reporting across federal, state and territory legislatures, was 'unlikely to work to significant benefit for MRIs'. Furthermore, in its view:

The ACNC Act has also not added value for MRIs regarding promoting good governance and accountability...

While the ACNC consolidates limited information on charities in one public place, it does not increase public accessibility to comprehensive information on MRIs and other charities.<sup>15</sup>

### ***Annual information statement***

2.16 The actual time taken to complete the 2013 annual information statement (AIS) across the sector appeared to be, understandably, difficult to quantify. UnitingCare stated that:

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13 *Submission 58*, p. 1.

14 *Submission 72*, pp 1–2.

15 *Submission 72*, p. 2

ACNC Commissioner Susan Pascoe has estimated that it will take NFP organisations between 10 and 45 minutes to complete the ACNC's 2013 Annual Information Statement. The AIS is designed to help reduce the need for NFP organisations to report to various different government departments and agencies over time, however at the moment the AIS is an additional requirement.

Based on the Commissioner's 45 minute estimate it will take the 57,500 organisations registered with the ACNC a total of 43,125 hours to complete the AIS. That is the equivalent of a year's work for nearly 25 full-time employees to meet this obligation.

Our analysis of the 2013 AIS is that the majority of the information it requests has already been provided to government by the majority organisations registered with the ACNC. The cost to the sector of this duplication of effort is significant and critically many organisations can only meet the requirement by taking resources away from frontline service delivery.<sup>16</sup>

2.17 The Commissioner of the ACNC, commenting on similar figures, said that:

You could look at it that way, but to be honest I find that to be a fanciful calculation and unhelpful. You could make a similar calculation for the time that people take to fill out their tax return and it would be millions of hours. It is the cost-benefit analysis: what is the value of filling in that information and what is the onus per entity. I think that aggregating to all entities, to me, just did not make any sense.<sup>17</sup>

2.18 It was expected that completing the AIS in later years would consume less time than that for 2013, as much of the information collected for the 2013 AIS would be able to be reused. On the other hand, annual reporting for medium and large registered charities (with incomes of \$250,000 or greater) in later years would, unlike in 2013, include financial reporting.

### ***Significance in comparison to other regulatory burdens on the sector***

2.19 Several submissions claimed that even if the ACNC Act increased red tape, the size of that increase was not significant compared to the total regulatory burden faced by the sector. The Deputy Chief Minister of the Australian Capital Territory wrote that:

It is my submission that the majority of the 'whole-of-relationship' impact on the majority of the sector entities registered with the ACNC derives not from the regulatory framework described above, but from the relationship that exists between the government agencies, across multiple jurisdictions, that provide the majority of the funding to the sector and the entities that receive that funding.

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16 Uniting Care Australia, *Increasing our Impact: Reducing Red Tape for the Not-for-profit Sector*, August 2013.

17 Ms Susan Pascoe, *Proof Committee Hansard*, 23 May 2014, p. 69.

This burden can be many orders of magnitude greater than the simple regulatory arrangements described above. It is principally comprised of requirements around procurement, contracting, reporting and relationship management activities, all of which can be repeated many times over for a sector entity to reflect the multiple relationships an entity can have with different funding agencies. The primary purpose of these funding agency administrative burdens are to provide assurance over the use of public monies, collect information that can contribute to more informed policy decisions, and/or to address risks to the most vulnerable in our society.<sup>18</sup>

### ***Red tape inherent in establishment of the ACNC***

2.20 The government argued that creating a separate national regulator was necessarily going to increase the regulatory burden on charities. According to the Explanatory Memorandum:

The Government believes it should not be imposing unnecessary regulatory control on the civil sector; rather, Government should work with and support the sector to self-manage. Vesting powers in a separate entity to oversight and regulate charities runs counter to the deregulation approach, which takes a risk-based approach to overseeing the institutions of civil society, whether they are for-profit or not-for profit.

The repeal of the ACNC is consistent with the broader deregulation agenda to boost productivity by removing any excessive, unnecessary and overly complex red and green tape imposed on business, community organisations and individuals by at least \$1 billion per year.<sup>19</sup>

2.21 Of course, whether this burden is justified depends, as mentioned in the ACNC Commissioner's testimony to the hearing,<sup>20</sup> on what the information gathering achieves. Mr Robert Fitzgerald put it another way:

...this is not about removing red tape and having none. The choice that the parliament has is a very stark one—either to embrace the ACNC which, by any measure, is an efficient and well-thought-through regulatory arrangement, or alternatively to entrench a regulatory arrangement that has been found to be failing by all of those inquiries. The basis for the ACNC was regulatory failure. It was not about the sector being made up of mischievous or difficult charities; it was always about trying to fix a regulatory failure and to create a platform by which the sector could grow. That remains the case today. So, to remove the ACNC is not simply to remove regulation; it is entrenching a regulatory environment that has been found failing since 1995.<sup>21</sup>

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18 *Submission 109*, p. [2].

19 Explanatory Memorandum, p. 2.

20 Ms Susan Pascoe, *Proof Committee Hansard*, 23 May 2014, p. 6.

21 Mr Robert Fitzgerald AM, *Proof Committee Hansard*, 23 May 2014, p. 58.

2.22 One concern raised was the failure of the ACNC legislation and the ACNC to adequately distinguish between different types of entities. Moore Stephens Australia identified the following issues:

- the need to treat charities in receipt of public funds differently to charities utilising primarily their own funds;
- the treatment of charities who previously had no financial reporting obligations;
- unrealistically low financial reporting thresholds;
- insufficient allowance for complex entity structures and groups.<sup>22</sup>

2.23 Mr Peter Hersh, Logicca, stated that:

...it does not make sense to look at the charity sector as one body. There are organisations which have no employees or a couple of people working in them, and then you compare those to some large schools and the universities. They are not the same and should not be registered the same way...

my view is that large charities structured as companies limited by guarantee are equivalent to public companies and should be subject to oversight by ASIC. A charity that feels it does not require ASIC regulation is free to structure itself differently.<sup>23</sup>

2.24 The Financial Services Council submitted that, in relation to charitable trusts:

From the outset, the ACNC regime has failed to distinguish between charitable funds and charitable institutions... As a result, the ACNC regime creates a new layer of regulation for charitable funds and their trustees. This is not only onerous on charitable fund trustees, who are not supposed to be the focus of the legislation, but it is also inconsistent with the regulatory regimes that currently apply to charitable fund trustees, such as licensed trustee companies and public trustees.

The failure of the ACNC regime to make the distinction between charitable funds and charitable institutions leads to undesirable and inefficient outcomes.<sup>24</sup>

2.25 Other submissions claimed that a specialist regulator was more likely to understand the diversity of the sector and to take this into account in formulating and administering regulation. Ms Rebecca Vassarotti from the Australian Council of Social Service stated that:

The launch of the Australian Charities and Not-for-profits Commission in 2012 was a major step forward in creating a regulatory environment that works for the not-for-profit sector rather than against it...

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22 *Submission 74*, pp 3–4.

23 *Proof Committee Hansard*, 22 May 2014, pp 12–13.

24 *Submission 102*, Attachment 1, p. 1.

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One of our concerns is, that without an entity such as the ACNC, there is no-one to interact with and have that conversation about how far we can reduce red tape and streamline those processes.<sup>25</sup>

2.26 The important question is, of course, whether the flaws identified in the current legislation are curable. As Mr Robert Fitzgerald stated:

...legislation by nature is always open to change. As that rolls out, in fact changes are required. That is simply the nature of good regulation making. Is anyone suggesting that the Corporations Law was perfect on day one? Of course not, but with the ACNC we have the lived experience, so now we can recommend to government changes based on that lived experience.<sup>26</sup>

***Red tape the price of transparency***

2.27 Many submissions claimed that some increase in red tape was a necessary cost of maintaining the accountability and transparency of the sector.

2.28 For example, much of the information in the AIS is used to populate the Register. The Register was intended to maintain the transparency and accountability of the sector. Donors (including volunteers) could gain information about individual charities through the Register.

2.29 Mr Robert Fitzgerald commented that:

There was a simple premise: if you receive very substantial tax concessions the community has a right to some information about that, and a right to believe that there are some minimum governance standards in place. That transparency is at the heart of the changes. We can talk about reducing red tape but we also have to acknowledge the transparency issues. We know that in this sector—I have been part of this sector as well as objective to it—there are some that oppose transparency. It is not popular to oppose transparency so throughout the whole period since 1995 others have found straw men. The easiest thing to say is that it increases red tape. If you do not like a reform that is the first thing you say.<sup>27</sup>

2.30 The Australian Council of Social Service expressed a similar sentiment:

...the NFP sector is now a significant element of the economy. Parts of the NFP sector provide a range of services on behalf of government, and accept a large amount of funds from governments, the public and private funders. There is strong (if not universal) support for transparent and accountable reporting to these funders. There is also growing discussion about accountability to service users, and by expansion, the general community.<sup>28</sup>

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25 Ms Rebecca Vassarotti, Acting Deputy Chief Executive Officer, Australian Council of Social Service, *Proof Committee Hansard*, 23 May 2014, p. 2.

26 Mr Robert Fitzgerald AM, *Proof Committee Hansard*, 23 May 2014, p. 62.

27 Mr Robert Fitzgerald AM, *Proof Committee Hansard*, 23 May 2014, p. 58.

28 *Submission 112*, p. 9.

2.31 More specifically, in relation to the new reporting requirements on charitable trusts, the ACNC commented that:

...a recent Corporations and Markets Advisory Committee (CAMAC) review found there was a need for more data and transparency on charitable trusts. There are 2 000 plus charitable trusts with more than \$3 billion under management and a shrinking number of trustee companies. The Review referred to concerns about '*unresolved stewardship and disclosure issues regarding the role of [Licensed Trustee Companies] in the administration of charitable trusts*'. Reporting to the ACNC goes some way to address these concerns, increasing transparency through the Register. The Review proposed that the ACNC more actively scrutinise trustee companies by conducting 'stewardship audits'. Any initial increase in compliance for trustee companies may be appropriate for greater transparency and oversight.<sup>29</sup>

2.32 As noted earlier a number of witnesses outlined their reporting obligations and the extent of external oversight over their activities. Clearly, for them transparency and other elements of good governance was already subjected to monitoring and scrutiny. For example, the Association of Australian Medical Research Institutes stated:

Because of the nature of research, MRIs are highly professional and regulated organisations overseen by experienced staff and Boards. The ACNC's 'light touch' approach to governance (which we support) does not add any value in ensuring good governance in the case of MRIs. We would argue that all those charities that are public companies limited by guarantee clearly have sufficient regulation and reporting requirements, with no value added by the ACNC Act.<sup>30</sup>

2.33 Catholic Health Australia (CHA) underscored the fact that the charitable hospitals and aged care services were highly regulated and publicly supervised: that regulation provided sufficient consumer protection and further that the ACNC added nothing to that. It explained:

While suggesting there exists opportunity for these varying obligations to be streamlined, CHA endorses the need for charitable hospital and aged care services to be required to transparently report on their safety and quality given the care they offer to older Australians, the sick and the injured. Supporting the need for a safety and quality regime for charitable hospitals and aged care services, the rigorous extent of this specifically targeted safety and quality regime...establishes the imposition of the very generalised additional ACNC requirements would never have been able to make any extra contribution towards promoting 'public trust and confidence in charitable hospital and aged care service delivery.'<sup>31</sup>

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29 *Submission 95*, p. 21.

30 *Submission 72*, p. 2.

31 *Submission 58*, p. 4.

2.34 As an example, Catholic Health listed just some of the obligations imposed on the sector, which provides safety details, financial reports, funding acquittals, quality reports and service planning reports to a range of State, Territory and Commonwealth government agencies.<sup>32</sup>

***Red tape result of lack of State and Territory cooperation***

2.35 Clearly, much of the reason for the ACNC Act causing an increase in reporting requirements was the failure to achieve national harmonisation of laws relating to charities. The Australian Catholic Bishops Conference explained:

The premise of the ACNC was that it would be a single reporting point for charities, with co-operation from other Commonwealth, State and Territory agencies. Co-operation has not been secured and this object is yet to be fulfilled. Neither the current nor the former Government has adequately explained why the Commonwealth and State Governments have not adequately overcome this duplication. If the States and Territories do not co-operate to reduce red tape, the ACNC simply increases red tape as a result of duplication of reporting requirements and the introduction of new reporting requirements.<sup>33</sup>

2.36 As Mr Joe Shannon from Moore Stephens Australia stated:

...there is obviously a huge range of opinion on whether its current framework is overreaching, on where it might be. That primarily comes out of the challenges of dealing within our current federated environment, where the vast majority of charities are established under non-federated laws. That creates some challenges. The goals of the ACNC to reduce red tape based on 'report once, use often' and a one-stop shop are very noble goals, but they are very far reaching in terms of the framework we are dealing with.<sup>34</sup>

2.37 According to the Explanatory Memorandum:

In the absence of harmonisation across all jurisdictions, the ACNC has added compliance burdens on the charitable sector from additional oversight and reporting obligations. In particular, it has meant:

- The majority of the sector which are unincorporated organisations—approximately 21,000 of whom are registered charities—are now subject to this new regulatory regime, whereas they previously fell largely outside of the sector's regulatory framework.
- The large number of incorporated associations (approximately 136,000, with around 6,000 of whom are charities) already regulated under relevant state and territory Acts now have duplicated reporting requirements.

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32 *Submission 58*, p. 4.

33 *Submission 76*, p. 3.

34 Mr Martin Joseph (Joe) Shannon, Director, Moore Stephens Australia, *Proof Committee Hansard*, 23 May 2014, p. 44.

- Charitable trusts, accountable to the state Attorneys-General, are now regulated at the Commonwealth level, with obligations or compliance activity they were not subject to previously.<sup>35</sup>

2.38 Indeed, several submissions argued that the ACNC should not have been established until national harmonisation was achieved.

### *Committee view*

2.39 The ACNC Act has significantly and unnecessarily increased red tape for many charities, thereby creating a burden with no apparent benefit either to those they serve or the wider community. Given the Commonwealth's limited legislative powers in this area, and the low probability of achieving nationally consistent regulation, the Act should be repealed.

2.40 In the process of developing and administering the ACNC legislation, a great deal has been learnt about what constitutes effective regulation of the not-for-profit sector. The regulatory regime that replaces the ACNC Act can apply these lessons.

## **National harmonisation of regulation**

### *Need for harmonisation*

2.41 The lack of coordination between the ACNC Act and other Commonwealth, State and Territory regulatory schemes results in the ACNC creating extra work for charities, as mentioned above. It is particularly a drain on resources for charities operating in multiple States and Territories.<sup>36</sup>

### *ACNC's involvement in national harmonisation*

2.42 The ACNC reports some progress in harmonisation.<sup>37</sup> Most prominently, South Australia and the Australian Capital Territory have agreed to align their regulatory regimes with that of the ACNC. This alignment would result in the abolition of reporting under those State and Territory systems for entities registered with the ACNC. Given the uncertainty about the future of the ACNC, the measures toward greater harmonisation have not yet been implemented.<sup>38</sup>

2.43 Even so, a number of witnesses spoke of significant advances in reducing the regulatory workload. The Community Council for Australia commended the ACNC for reaching this point:

The ACNC has done more in a little over a year than COAG and most government agencies have done in 20 years to reduce red tape—even if only 25% of states and territories have come on board...

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35 Explanatory Memorandum, p. 2.

36 Financial Services Council, *Submission 102*, Attachment, pp. [6] explains the burden facing interstate charities.

37 Australian Charities and Not-for-profits Commission, *Submission 95* p. vi.

38 Mr Andrew Barr MLA, *Submission 109*, pp 1–2.

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A lot more needs to be done, but the ACNC has shown it can achieve real changes in reducing red tape.<sup>39</sup>

2.44 Fundraising regulation has been a particular concern of the sector. The Industry Commission recommended back in 1995 that COAG be tasked with harmonising fundraising regulation.<sup>40</sup> This has not yet been addressed. David Crosbie from the Community Council for Australia explained his involvement with attempts to rationalise fundraising legislation:

...I managed to get at the consumer affairs meetings of COAG where the consumer affairs ministers met. I managed to get on the agenda harmonising of fundraising. The consumer affairs ministers—I will not say which particular jurisdictions—said it wasn't an issue and they weren't going to address it. When they came out saying, 'Harmonising fundraising legislation is not an issue.' I said, 'Then we should just ignore you then. We should just non-comply with the requirements around fundraising, because you are not prepared to listen to us.' I actually do think that the way fundraising works in this country for the not-for-profit sector would not be tolerated in any other industry. In 1995, an inquiry delivered to the then Assistant Treasurer said that COAG should start, urgently, to work on harmonising fundraising legislation. That was almost 20 years ago. I have watched the progress of COAG over that period of time, and to say it has failed is an understatement. There have been numerous attempts to try and harmonise fundraising. The only steps ever taken positively to harmonise fundraising in my more than 30 years in the sector were when the ACNC managed to get the South Australian and ACT governments to agree that they would harmonise their fundraising with the annual information statement.<sup>41</sup>

2.45 Undoubtedly, it is relatively early days for the ACNC. It is not clear how much more national harmonisation, if any, the ACNC would achieve with time. Many submissions asked what agency would advance the harmonisation agenda if the ACNC were abolished. These submissions claimed that without progress in this matter, any short-term reductions in red tape from repealing the ACNC Act would be more than offset by the missed opportunity to reduce red tape by aligning regulation across jurisdictions. For example, Ms Rebecca Vassarotti from the Australian Council of Social Service stated:

One of our concerns is that if you were to get rid of an agency like the ACNC there would be no-one to have that conversation with. That would be a lost opportunity when looking at what might be achieved. The ACNC is only at the early stages of working with the other jurisdictions, to achieve more it needs the engagement of other jurisdictions in that conversation. The ACT and South Australian governments are the two governments that

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39 Community Council for Australia, *Submission 89*, p. 7.

40 Industry Commission, *Charitable Organisations in Australia*, Report No. 45, 16 June 1995.

41 Mr David William Crosbie, Chief Executive Officer, Community Council for Australia, *Proof Committee Hansard*, 23 May 2014, p. 25.

have started that process, starting to look at ways the significant regulatory burden faced by not-for-profit sector organisations can be minimised by working together. Talking about the significant impost of regulation on the not-for-profit sector, even if the ACNC did not exist tomorrow and there were no requirements set by the ACNC, there would still be a regulatory burden on the community sector...If jurisdictions want to work with a Commonwealth agency and an organisation like ACNC does not exist to bring all of that work together, who do you have that conversation with?<sup>42</sup>

2.46 The now-Minister stated, in 2012, that the Coalition would 'respect the role of the states, but work with them to achieve harmony in relation to fundraising codes and other regulations'.<sup>43</sup>

### ***Committee view***

2.47 The ACNC has shown what can be done when there is a commitment to achieving national harmonisation of charities regulation. Were the bill to pass, another Commonwealth agency, such as the Department or the National Centre for Excellence, could and should build on the work of the ACNC in this area.

### **The powers of the ACNC**

2.48 The Minister stated in his second reading speech that:

Establishing the commission has introduced new powers in information collection, monitoring and compliance that are not available to Commonwealth bodies with comparable powers in relation to enforcement and removing responsible persons (such as the Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority).<sup>44</sup>

2.49 Catholic Health informed the committee, however, that the ACNC had created legal uncertainty as to the operation of charitable law in Australia and created a set of excessive Commissioner's powers yet to be tested and defined by judicial process.<sup>45</sup>

2.50 The Financial Services Council also noted the legal difficulties created for some charities, submitting that:

The suspension, removal and replacement provisions in the ACNC Act grant powers to the Commissioner that go well beyond the powers of any other Federal regulator. The Commissioner can remove and replace the responsible entity of a regulated entity for actual and potential breaches of the ACNC regime, without a court process. This means that the directors of a public listed entity could potentially be removed from office by the

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42 Ms Rebecca Vassarotti, Acting Deputy Chief Executive Officer, Australian Council of Social Service, *Proof Committee Hansard*, 23 May 2014, p. 8.

43 Kevin Andrews, *The Coalition's approach to the charitable sector: empowering civil society*.

44 The Hon Kevin Andrews, *House of Representatives Hansard*, 19 March 2014, p. 2,386.

45 *Submission 58*, p. 3.

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Commissioner in the absence of a proper court process that ensures due process and the application of the rules of evidence.<sup>46</sup>

...there is no other regulator that can make a decision to remove a director of a public company from office without a court process. And a court process would obviously require the application of the rules of evidence, due process to be given to the director in question, and a proper decision to be made on the fact...

...a decision to remove a director of a public company is an enormous decision with very grave consequences for the company involved. It is the kind of decision which, in the past, has been left to a court of law that is well versed in making these kinds of serious decisions with significant consequences. We believe that the court is the best body and the most experienced body to make such a serious decision. We also believe that the ACNC regime grants these powers to the commissioner in respect of a single charitable trust. You need to understand that a licensed trustee company might have thousands of trusts under its administration, or at least hundreds. So to make such a serious decision about a company's conduct in relation to one trust is out of proportion, we feel, to whatever mischief the power is seeking to remedy—if, in fact, any mischief has shown.<sup>47</sup>

2.51 The FSC obtained legal opinion from Herbert Smith Freehills on the provisions governing the suspension and removal of trustees and the directors of corporate trustees under the ACNC Act. The committee quotes at length one part of this advice:

The removal powers vested in the Commissioner are more extensive than those of the Australian Securities and Investments Commission (ASIC). By way of comparison:

- In certain cases, ASIC is only able to remove directors by application to the court and significantly, the court is the final arbiter. However, in the context of the ACNC Act, the Commissioner may exercise the removal powers without the involvement of the court, which means that the protections afforded by the application of the rules of evidence and doctrine of precedent would be lacking. In our view, this creates uncertainty and potential for unfairness.
- The Commissioner's powers to remove directors generally apply to less serious circumstances and less serious breaches or likely breaches of the ACNC Act, the governance standards or the external conduct standards.
- Unlike the Commissioner, ASIC cannot disqualify a person for something that has not yet occurred as a preventative measure.<sup>48</sup>

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46 Financial Services Council Ltd, *Submission 102*, p. [1].

47 Ms Eve Brown, Senior Policy Manager and Legal Counsel, Financial Services Council, *Proof Committee Hansard*, 23 May 2014, pp 38, 42.

48 *Submission 102*, Attachment 2, p. 2.

2.52 The legal advice summarised the authors' opinion on this matter of the Commissioner's powers:

The stated intention behind the ACNC Act is to offer powers that are proportionate to the non-compliance and a 'targeted' enforcement mechanism. However, the powers of the Commissioner are broad (and extend to breaches of governance standards) and have wide-reaching consequences. Removing a director of a corporate trustee under the ACNC Act is very significant and denies the director the ability to participate in any other trust appointments or other corporate activities and roles of that corporate trustee.<sup>49</sup>

2.53 In response to the evidence on the powers of the Commissioner to remove or suspend, the ACNC claimed that:

...there is no basis for the assertion that ACNC has greater powers than other Commonwealth regulators. Rather, the ACNC model is based on the same or similar powers to other Commonwealth regulators. In fact, the ACNC has narrower powers than agencies such as the ATO, ASIC and the Australian Prudential Regulation Agency. These agencies have the power to apply for search and seizure warrants under their respective legislation, whereas the ACNC is only able to monitor compliance. Also, many of the powers given to the ACNC can only be exercised with a narrow class of charities that come within the definition of 'federally regulated entities'<sup>50</sup>

2.54 Another concern raised about legal implications stemming from the ACNC assuming responsibilities from ASIC involved the reduction in the rights of the auditor in respect of charities that are limited by guarantee. Mr Hersh, Logicca, explained that under the ACNC regime, charities no longer need to comply with certain sections of the Corporations Act as they apply to companies limited by guarantee. Based on his experience, the removal of these provisions had 'severely compromised the ability of external auditors to conduct their audit'.<sup>51</sup> Mr Hersh cited the following examples of where the auditors' authority had been diluted:

- the auditor's legal authority to require the delivery of information has been eliminated;
- the auditor's defence against defamation proceedings in the event of suspecting impropriety has been eliminated;
- the requirement that ASIC approve the dismissal of an auditor has been eliminated;
- the requirement to disclose the attendance details at directors' meetings has been eliminated;

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49 *Submission 102*, Attachment 2, p. 2.

50 Australian Charities and Not-for-profits Commission, *Submission 95*, p. 21.

51 *Proof Committee Hansard*, 23 May 2014, p. 12.

- the requirement for minimum notice periods prior to the convening of an AGM has been eliminated;
- the maximum period after year-end that a company can now hold its AGM has been extended to 12 months from five months.<sup>52</sup>

2.55 Mr Hersh concluded:

Thus, under the ACNC regime, a director can refuse to provide information to external auditors and then dismiss them at will, with the only possible consequence being an untested power of the ACNC Commissioner to intervene. This fosters an atmosphere of impunity that could actually be conducive to impropriety and illegality. It also stands in stark contrast to the powers of the external auditors during the pre-ACNC era.<sup>53</sup>

2.56 According to Mr Hersh, the sections of the Corporations Act relating to large companies requiring an audit were not replicated in the ACNC legislation, so, in his words 'the auditor is out there without the backup he previously had for large companies'.

2.57 Mr Murray Baird, Assistant Commissioner General Counsel, ACNC, informed the committee that it was not his understanding that audit powers had been turned off and not replaced. He explained further that the powers for the auditor to ensure that they receive full information were very clearly set out in the ACNC Act:

There are switch-on provisions—some provisions having been switched off in the Corporations Act. So any suggestion that there has been a weakening of the role of the auditor is not the situation from our point of view.<sup>54</sup>

2.58 The ACNC provided the committee with a supplementary submission in which, among other things, it informed the committee that:

...section 60–55 of the ACNC Act has broadly the same effect as sections 310 and 312. Section 60-55 requires the charity to give the auditor access to the books of the charity and all reasonably requested information. The auditor can therefore point to that section as evidence of his/her right to obtain required information.<sup>55</sup>

2.59 In response to Mr Baird's explanation, Mr Hersh informed the committee that his concern was with the removal of sections 312 and 310 of the Corporations Act, and the new practice of ASIC not to get involved with the removal of auditors. He explained that:

- section 312, is a requirement on the officers of a company to assist the auditor and provide information to the auditor; and
- section 310 sets out the powers of an auditor to obtain information.

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52 *Proof Committee Hansard*, 23 May 2014, p. 12.

53 *Proof Committee Hansard*, 23 May 2014, p. 12.

54 *Proof Committee Hansard*, 23 May 2014, p. 66.

55 *Supplementary Submission 95.1*

In his view, these two sections are 'NOT switched back on' by the ACNC legislation: that the comparable section in the ACNC legislation is section 60–55 (not section 60–50), which requires a registered entity to give reasonable access and information to the auditor.

2.60 Mr Hersh cited the differences between sections 310 and 312 of the Corporations Act and the definitions clause on books as well as section 60–55 of the ACNC Act:

- the switched on section is a duty of the company NOT the officer;
- failing to comply with section 312 is an offence of strict liability under section 6.1 of the Criminal Code;
- section 60–55 is not an offence of the officer at all;
- the Corporations Act sections refer to the auditors rights to inspect 'books' which is a defined term in that act, it is not defined in the ACNC Act so may require court interpretation and there is now a question as to how far that definition will go; and
- the Corporations Act definition includes registers, records of information, financial reports or records however compiled and documents—no definition is contained in the ACNC Act.<sup>56</sup>

2.61 With regard to his apprehension that an officer could refuse to give information to an auditor and then have them removed, Mr Hersh explained:

The sections of the Corporations Act which relate to the removal of auditors have not been switched off by the ACNC legislation but my firm has enquired of both the ACNC and ASIC and both informed us that the procedure is now for the ACNC to be informed. It should be noted that ASIC then informed us that the ACNC would inform them, however the ACNC stated that would not be the case. Both made it clear to us that neither the ACNC or ASIC would interfere with the removal or resignation of an auditor.<sup>57</sup>

2.62 In summary, he remained concerned that sections of the Corporations Act had been switched off and, despite the assertions otherwise, the sections that have been switched on effectively water down the rights of and the ability of an auditor to conduct an audit.<sup>58</sup>

2.63 It should be noted that the MRIs also experienced confusion stemming from obligations under the Corporations Act and under the ACNC Act. Dr Nicole Den Elzen, Association of Australian Medical Research Institutes, told the committee that one of the biggest burdens was the change in legislation. She explained:

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56 *Supplementary Submission 22.1.*

57 *Supplementary Submission 22.1.*

58 *Supplementary Submission 22.1.*

The Corporations Act used to regulate us, along with our constitutions and various other legislation, but now, because of the way the ACNC Act was implemented, some of the Corporations Act still applies and some of it does not. So that has become quite a bit more complicated than it was before. I know from when we changed our constitution last year that you now have to be across both acts, and that is an increased burden in terms of red tape.<sup>59</sup>

2.64 Dr Den Elzen gave the following example:

The Corporations Act is what regulates the majority of our members. Now, parts of that apply and parts of it do not, so it is actually quite complex. For example, when you want to change a constitution, which is not that unusual, and go to a lawyer to organise that, they have to go through the whole Corporations Act, the whole ACNC Act, the regulations and the transitional act to make sure you are complying with all of that. Before with the Corporations Act you knew what you had to do and what your obligations were, but some of those now apply and some of them do not. So that has been complicated, it is not just the reporting.<sup>60</sup>

2.65 In reference to some of the problem about the legislation and changes in the legislation creating more complication, she said that it was not a teething problem.<sup>61</sup>

### ***Committee view***

2.66 The committee formed the view, that it was inappropriate for there to be a Commonwealth charities regulator with the power to remove or suspend directors and trustees without court proceedings. The committee also notes how complicated the system has become with two separate pieces of legislation imposing their own obligations.

### **Replacing the ACNC in 2 steps**

2.67 Since the enactment of the Act, there has been uncertainty as to the future of the ACNC. Passing this bill would give some certainty to the sector. On 13 May 2014, the Minister informed Parliament that while the government had committed to remove the ACNC, it would further support charities and the NFP sector through a new National Centre for Excellence (NCE). He explained further that the NCE would be an advocate for the sector and a leader in innovation and provide education, training and development opportunities:

The NCE will foster innovation, provide education and represent the interests of charities and NFP agencies to government.<sup>62</sup>

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59 *Proof Committee Hansard*, 23 May 2014, p. 35.

60 *Proof Committee Hansard*, 23 May 2014, p. 34

61 *Proof Committee Hansard*, 23 May 2014, p. 33.

62 The Hon Kevin Andrews, answer to question on notice No. 41, *House of Representatives Hansard*, 13 May 2014, p. 78 and Media release, 'ACNC must go to free up red tape', 19 March 2014.

2.68 In his view, the abolition of the ACNC and the establishment of the NCE would move 'the focus from the stick to the carrot'—'from coercive regulation to collaborative education, training and development'.<sup>63</sup> The Minister has also announced his intention to consult with stakeholders about the establishment of the NCE.<sup>64</sup>

2.69 However, the repeal would only take place with the passage through the Parliament of the No. 2 bill. The Explanatory Memorandum explains that:

The capacity for the Minister to determine the successor Agency through a legislative instrument reflects the two-stage approach to replacing the Commission...his two-stage approach allows the Government to affirm its intention to proceed with the repeal, while working through the legislative and administrative issues involved in winding down the Commission's operation and establishing the National Centre for Excellence.<sup>65</sup>

2.70 According to the Explanatory Memorandum, this two-stage approach would allow the government 'to affirm its intention to proceed with the repeal, while working through the legislative and administrative issues involved in winding down the Commission's operations and establishing the National Centre for Excellence'.<sup>66</sup>

2.71 Many submissions criticised this 2-step approach. For example, the Queensland Law Society submitted that the approach creates uncertainty as to what charities' future obligations would be, and makes it difficult for the ACNC to do its job. It also makes evaluation of the bill difficult, as it is hard to evaluate whether the current state of affairs is worse than its (uncertain) replacement.<sup>67</sup>

2.72 They also suggested the role and functions of the proposed National Centre for Excellence were unclear.

### ***Committee view***

2.73 On numerous occasions the minister has made plain the government's intention to abolish the ACNC. He has also indicated that he would continue to consult with stakeholders about the establishment of the NCE. The bill is intended to provide certainty to the not-for-profit sector, the ACNC and other regulators, by making it clear its intention to abolish the ACNC. It is better to provide this certainty now, rather than delay while the details of the No. 2 bill are worked out in consultation with the sector.

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63 The Hon Kevin Andrews, 'Address to the bccm "make it mutual" workshop', 17 March 2014, National Press Club.

64 See for example, The Hon Kevin Andrews, Media release, 'ACNC must go to free up red tape', 19 March 2014.

65 Explanatory Memorandum, p. 3.

66 Explanatory Memorandum, p. 2.

67 Queensland Law Society, *Submission 7*, p. 1.

## Concerns with the ATO

2.74 The committee heard much evidence about whether charities need a single, national, independent, specialist regulator. The Minister, in his second reading speech, claimed that:

Given that the regulators in place before the commission was established can provide similar regulatory oversight at a lesser cost—both in terms of administrative costs to government and in terms of costs imposed on regulated entities—the introduction of a specialist regulator to monitor and enforce a codification of generally applicable laws has not proven to be the best use of Commonwealth funding.<sup>68</sup>

2.75 Much of the discussion on this issue was couched as a comparison of the ATO's and the ACNC's administration of charities law.

2.76 As mentioned in Chapter 1, the bill's Explanatory Memorandum states that:

It is intended that regulatory functions previously transferred to the ACNC from the ATO and ASIC will be returned to those bodies. In place of the ACNC, broad support for the sector will be provided by a new National Centre for Excellence.<sup>69</sup>

2.77 The Minister has stated that:

As the regulator of every Australian taxpayer, the Australian Tax Office is more than capable of overseeing the work of charities—it's done it before, it can do it again.<sup>70</sup>

2.78 The ATO itself had previously stated that:

It is also our view that administration would be better served by a single, independent common point of decision making on definitions leading to conclusions about whether organisations are charitable or non-profit, such as occurs with the Charities Commission in the UK for example.<sup>71</sup>

2.79 The committee received much anecdotal evidence on experiences dealing with the ATO and the ACNC. Most, but not all, of this evidence was more favourable towards the ACNC. For example:

My experience has definitely been more positive with the ACNC. I have found them personally easier to engage with and converse with about issues and problems. They are also more supportive of the sector and are involved more broadly to educate the sector. That is my personal experience...

To be honest, there has been feedback both ways, and it is more anecdotal evidence, but the majority has been more positive about the ACNC—probably the vast majority, to be honest. You sometimes hear whispers of

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68 The Hon Kevin Andrews, *House of Representatives Hansard*, 19 March 2014, p. 2,386.

69 Explanatory Memorandum, p. 3.

70 Kevin Andrews, media release, 'ACNC must go to free up red tape', 19 March 2014.

71 Australian Taxation Office, Submission to Inquiry into the definition of charities and related organisations.

the opposite, but the vast majority of feedback would be more positive about the ACNC. That is only anecdotal evidence, it is not a measured process, but I would be confident in making that statement.<sup>72</sup>

2.80 The Australian Council of Social Service claimed that obtaining endorsement as a charity from the ATO was:

...an incredibly difficult and complex task...it was certainly a very difficult process for organisations that had some very strong claims around their charity status.<sup>73</sup>

2.81 The Queensland Law Society, in its submission, pointed out the ATO's 'pattern of long delays in dissemination of information to practitioners and the sector', and described the ACNC's 'timely response to legal developments and dissemination to the sector' as a 'success' that:

...demonstrates that the ACNC is a nimble, focussed and fit for purpose regulator, while the ATO systems are primarily designed for their core responsibilities. These do not appear to accommodate the particular profile or needs of the charities sector.<sup>74</sup>

2.82 On the other hand, Logicca Pty Limited, a chartered accountant, submitted that:

Since the introduction of the ACNC I have approached the commission on a number of occasions on behalf of clients to register them as charities. As compared to the one stop shop registration with the ATO, I found the process more time consuming and much more difficult. I found the ACNC staff unnecessarily complicated the processes requiring minor amendments to constitutions that I am confident would have passed the ATO without concerns.<sup>75</sup>

2.83 There were concerns expressed about a perceived conflict of interest between the ATO determining charitable status and having a responsibility to maximise taxation revenue. For example:

The Australian Government intends to shut down the ACNC as soon as it can... It is planning to return the key role of determining charitable status to the Australian Taxation Office, re-creating a conflict of interest. This approach is, at best, an unfortunate policy for charities across Australia and our community. Red tape will continue to grow, the size of the bureaucracy will grow, and services to the sector and the public will be reduced.<sup>76</sup>

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72 Mr Martin Joseph (Joe) Shannon, Director, Moore Stephens Australia, *Proof Committee Hansard*, 23 May 2014, pp 46, 48.

73 Ms Rebecca Vassarotti, Acting Deputy Chief Executive Officer, Australian Council of Social Service, *Proof Committee Hansard*, 23 May 2014, pp 3–4.

74 *Submission 7*, p. 6.

75 *Submission 22*, p. [2].

76 Community Council for Australia, Open Letter to the Prime Minister re Civil Society Support for Independent Regulator, 19 March 2014.

2.84 There was little concrete evidence of an actual conflict. To describe the ATO as having an obligation to maximise the tax it collects is simplistic. The ATO describes its outcome as:

...confidence in the administration of aspects of Australia's taxation and superannuation systems through helping people understand their rights and obligations, improving ease of compliance and access to benefits, and managing non-compliance with the law.<sup>77</sup>

2.85 One submitter, Logicca Pty Limited, commented that:

I have heard ACNC staff and some representatives of larger charities at seminars state that in their view it was inappropriate for the ATO to be registering charities and giving tax concessions as the ATO's role is to collect tax. In my long period working in this area I have never found this to be a problem. I find it difficult to understand why it is thought appropriate that the ATO can act as gatekeeper and enabler of business but cannot be both for the charity sector.<sup>78</sup>

2.86 Logicca informed the committee that since discussion on the ACNC commenced, he could not recall 'one example where the dual role of the ATO for charities has been a problem'.<sup>79</sup>

### ***Committee view***

2.87 The Committee sees no reason why the Australian Taxation Office could not administer any charities law assigned to it in an objective and fair way. In doing so, the ATO could learn much from the way the ACNC has interacted with the not-for-profit sector.

### **Conclusion**

2.88 The committee has considered the evidence and formed the view that the abolition of the ACNC would, as intended, relieve the regulatory burden from many charities. Furthermore, it fully endorses the establishment of a National Centre of Excellence as an advocate for the sector and a leader in innovation and as a means of providing education, training and development opportunities.

### **Recommendation 1**

2.89 The committee recommends that the bill be passed.

**Senator David Bushby**  
**Chair**

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77 Australian Taxation Office, About us: Our outcome, <https://www.ato.gov.au/About-ATO/About-us/How-we-do-things/Our-outcome/>, accessed 6 June 2014.

78 Logicca Pty Limited, *Submission 22*, p. 2.

79 Logicca Pty Limited, *Submission 22*, p. 2.



# Dissenting Report by Labor Senators

## Background

1.1 During the 17 years prior to the establishment of the ACNC, there had been 'six separate reviews of the charitable and NFP sector. They included: the comprehensive 2001 report of the inquiry into the definition of charities and related organisations; the 2009 review into Australia's future tax system; and the Productivity Commission's 2010 report, *Contribution of the not-for-profit sector*. The Productivity Commission identified clearly 'an urgent need to bring together the multiplicity of governance, taxation and fundraising regulatory arrangements, especially at the Commonwealth level'. The Commission stated:

While reducing compliance costs is one motivation, improvements in the regulatory regime are important for maintaining trust in the fidelity and integrity of the NFP sector.

1.2 The Commission proposed the establishment of a national 'one-stop-shop' for Commonwealth regulation in the form of a Registrar for Community and Charitable Purpose Organisations to improve and consolidate regulatory oversight and enhance accountability to the public.<sup>1</sup> During his second reading speech introducing the ACNC Act, the Minister referred to the numerous reviews on the NFP sector, noting that they:

...recommended simplifying and harmonising taxation and regulation for the sector, with a national regulator and a statutory definition of charity.<sup>2</sup>

1.3 It cannot be disputed that the ACNC regulatory regime was a well-researched and thoroughly considered reform with wide community and NFP sector support. Indeed, Mr Robert Fitzgerald described the consultation period leading up to the ACNC Act as:

...the most exhaustive period of policy development, inquiry and consultation ever undertaken in relation to a policy affecting the not for profit sector.<sup>3</sup>

1.4 Making a similar observation, Ms Susan Pascoe, Commissioner, ACNC, informed the committee that the ACNC was 'born from nearly two decades of advocacy, formal inquiries and formal consultative processes'.<sup>4</sup>

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1 Productivity Commission, *Contribution of the Not-for-Profit Sector*, Productivity Commission Research Report, January 2010, p. xxxvi, [http://www.pc.gov.au/data/assets/pdf\\_file/0003/94548/not-for-profit-report.pdf](http://www.pc.gov.au/data/assets/pdf_file/0003/94548/not-for-profit-report.pdf) (accessed 12 June 2014).

2 Mr David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation, *House of Representatives Hansard*, 23 August 2012, p. 9722.

3 *Submission 52*, p. 5.

## **The establishment of the ACNC**

1.5 The ACNC Act established a new regulatory framework for the sector and created the ACNC as the Commonwealth level regulator responsible for administering the legislation. The reasons for having a new regulatory system for the NFP sector were direct and clear. The intention was to:

- establish a robust and streamlined regulatory framework for the NFP sector, including a 'report-once, use-often' reporting framework— the ACNC would create a 'one-stop shop' for ACNC registration, tax concessions, and accessing Australian Government services and concessions;
- 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.

1.6 According to the 2012 Explanatory Memorandum:

The move to the 'report-once, use-often' approach would reduce the compliance burden associated with duplicative, ad hoc and inconsistent reporting.<sup>5</sup>

## **The bill to repeal the ACNC**

1.7 To appreciate fully the need for, and work of, the ACNC, an understanding of the regime that existed before its establishment is necessary. In this regard, the Community Council for Australia described the convoluted and time-consuming process that charities were required to follow even for a simple task:

...to hire a local hall at a discounted charitable rate, gain a concession on local rates charges, achieve a reduction in payroll tax, put forward a submission for funding, participate in a government tender process, register a fundraising activity or seek to claim a concession of any kind, the organisation must be able to produce some kind of bona fides, a kind of organisational passport. No such document existed—there was no public national register of charities. Charities were forced to provide copies of letters from the Australian Taxation Office that define their eligibility for taxation concessions as proof of their charitable status. The situation was difficult at best.

When you consider the range of regulatory bodies, different levels of government, different government departments all imposing their own form of regulatory requirements on the sector, the cost of inappropriate regulation becomes apparent.<sup>6</sup>

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4 *Proof Committee Hansard*, 23 May 2014, p. 65.

5 Explanatory Memorandum , Australian Charities and Not-for-profits Commission Bill 2012 and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, p. 4.

6 *Submission 89*, p. 3.

1.8 In its view, there was overwhelming evidence that the previous system for regulating charities 'did not work in the interests of the government, the community and charities themselves.'<sup>7</sup> Furthermore, since its establishment, support for the ACNC has remained strong. According to the Commissioner:

Support for the ACNC or a national charity regulator is consistently at around 80 per cent, as evidenced from an analysis of the submissions to this inquiry and three independent surveys conducted by Grant Thornton, Pro Bono Australia and Our Community.<sup>8</sup>

1.9 ACOSS also referred to the strong support for the ACNC, citing the recent survey showing that 80 per cent of the sector supported the ACNC:<sup>9</sup>

It is unusual for an industry to be championing regulation. However, as the recipient of ineffective regulation for many years, the Australian NFP sector recognises the value of an effective, sector-centred, streamlined and proportionate regulatory regime. In particular, the sector recognises the positive role that regulation can play in supporting the work of the sector. This includes:

- maintaining public trust in the work of the sector;
- working with the sector to raise the standard around governance, accountability and transparency; and
- working to introduce meaningful reporting of the sector and reduce duplication of reporting.<sup>10</sup>

1.10 Many submitters drew attention to the fact that ACNC had only been in operation since the end of 2012. For example, ACOSS recognised that:

...it is still in the early stages of development. As such, many of the objectives of the ACNC, particularly in relation to reducing 'red tape' and duplication have not yet been fully achieved. However, work that has commenced in a number of jurisdictions, particularly in South Australia and the ACT, has shown progress towards these aims, and has given the sector an indication of the usefulness of the ACNC in supporting a streamlining of reporting, and a reduction of 'red tape'.<sup>11</sup>

1.11 The ACNC also noted the significant progress that had already been made in only 16 months, including setting up Australia's first free, online, national register of charities, a 'report-once use-often' framework to reduce red tape, and a specialist sector-tailored approach. It explained further that if allowed to be fully implemented, the ACNC model:

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7 *Submission 89*, p. 3.

8 *Proof Committee Hansard*, 23 May 2014, p. 65.

9 *Submission 112*, p. 11.

10 *Submission 112*, p. 5.

11 *Submission 112*, p. 5.

...has the potential for very significant longer term benefits (such as simplifying and streamlining fundraising requirements and reducing duplicative reporting across agencies and jurisdictions). Such opportunities will be lost if the ACNC model is not given time for full implementation.<sup>12</sup>

1.12 The Community Council for Australia listed some of the achievements so far, which include:

- over 3000 new charities have been registered with the ACNC—feedback collected by the ACNC and other organisations indicates that these new charities found the process of becoming a registered charity through the ACNC to be a positive process;
- over 60,000 charities are now listed on a publicly available register—for the first time, Australians can look up a charity and there have already been over 400,000 visits to this register;
- the extent of information provided by this register is growing as charities complete their Annual Information Statements (AIS)—already 83 per cent of eligible charities have completed their AIS, 25,000 charities have lodged their governing documents with 22,000 already published on the register;
- 686 complaints received which resulted in over 250 investigations—most of these investigations have been resolved through various forms of mediation and working with the charities themselves;
- over 1.3 million visits to the ACNC website, more than 45,572 telephone calls answered with an average wait time of 33 seconds, and 55,000 mail items have been received;
- 216,214 visits to ACNC guidance (including factsheets, guides and FAQs);
- a 'one stop shop' for charities to register, report, and access Commonwealth Government taxation and other concessions—the ACNC and the ATO have developed a seamless registration process across both agencies;
- a Memoranda of Agreement with seven government agencies/regulators;
- close to finalising the Charity Passport to facilitate a 'report once, use often' framework so that charities no longer need to report multiple times to different government agencies (this passport will be supported by Commonwealth Grant Guidelines) and other regulatory and funding agencies.<sup>13</sup>

1.13 In the view of the Council, ACNC has made remarkable progress in a short period of time. It stated the it would be difficult:

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12 *Submission 95*, p. iv.

13 *Submission 89*, pp 6–7.

...to find any comparable regulator that has been able to achieve so much in its establishment phase, especially when you consider the political pressure applied on the ACNC since its inception.<sup>14</sup>

1.14 According to the Council, the ACNC was 'not an instant quick fix, but a long term structural change that will become increasingly important over time'.<sup>15</sup> The signatories to an open letter to the Prime Minister reinforced this view:

In little over one year of operation, the ACNC has built a strong positive reputation by establishing the first public national register of charities, registering more than 2,600 new charities, responding to over 70,000 requests for information from charities and the broader community, investigating and resolving over 200 complaints against charities, and monitoring the extent of red tape and level of public trust and confidence in our charities. The ACNC has done what few new regulators achieve—gained widespread support across the sector it is regulating.<sup>16</sup>

1.15 The Queensland Law society observed that the Regulatory Impact Statement fails to acknowledge the progress made in setting up the framework.

### ***Remove duplication***

1.16 As highlighted in the majority report, a number of groups within the NFP sector have found difficulties with the new regime. Ms Pascoe accepted that some of the concerns raised, including those expressed by Catholic Health Australia and by the Association of Australian Medical Research Institutes (MRIs), were understandable. The Commissioner assured the committee, however, that:

...the intention would be to adopt similar practice to that agreed with the education sector; in other words...for very well-regulated sectors to find a means of either linking to existing databases or extracting from those databases and putting on the ACNC website.<sup>17</sup>

It should be noted that I have advised relevant state and territory ministers and local charities that the ACNC will accept their financial reports prepared for jurisdictional regulators until 2015, to avoid duplication—so in a similar vein.

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14 *Submission 89*, p. 9.

15 *Submission 89*, p. 1.

16 Open Letter to Government: Retain Charity Regulator—18 March 2014, Professor Ann O'Connell, NFP Project, Melbourne Law School, University of Melbourne; Belinda Drew, Chief Executive Officer, Foresters Community Finance; Brett Williamson, Chief Executive Officer, Volunteering Australia; Dr Caroline Lambert, Executive Director, YWCA Australia; Dr Cassandra Goldie, Chief Executive Officer, Australian Council of Social Services; Carrie Fowlie, Executive Officer, Alcohol Tobacco and Other Drug Association ACT; Carrillo Gantner AO, Chairman, Sydney Myer Fund and 51 other parties.

17 *Proof Committee Hansard*, 23 May 2014, p. 66.

1.17 ACOSS also noted that existence of a minority voice outlining opposition to the ACNC on the basis of duplication of regulatory effort, over reporting and costs of compliance. It shared the view of ACNC that:

These are issues that, with goodwill and effort can be overcome, and in many cases relate to reluctance of regulatory bodies other than the ACNC to explore efficiency and streamlining.<sup>18</sup>

1.18 The Labor members note the willingness of the ACNC to work closely with highly regulated bodies such as Catholic Health, Universities and the MRIs to minimise duplication and to remove any complications arising from interaction between the Corporations Act and the ACNC Act. The Labor members believe that through their continued cooperation ACNC could develop mechanisms that would remove the need for duplication in administrative tasks and reporting, which would significantly reduce cost and time.

### ***Lack of consultation***

1.19 Many submitters complained about the lack of consultation regarding the proposed repeal of the ACNC Act.<sup>19</sup> The approach to consultation stands in stark contrast to the comprehensive discussions and reviews that took place before the ACNC was established. Mr Robert Fitzgerald made an observation consistent with many others who opposed the bill: He stated:

The process has lacked any open or formal consultation processes. There have been no independent reviews or inquiries, no issues or discussion papers, no call for submissions, no exposure drafts.<sup>20</sup>

1.20 The Queensland Law Society was particularly concerned with the Explanatory Memorandum and the Regulatory Impact Statement 'being less than rigorous, and not meeting the usually high standards and disciplines of Commonwealth legislative processes'.<sup>21</sup>

### ***Counterproductive***

1.21 In essence, the evidence from the great majority of submissions indicated that the abolition of the ACNC would be counterproductive. A number of submitters noted that the repeal of the ANC act contradicts the government's own stated intentions. In Mr Fitzgerald's opinion, the abolition of the ACNC would:

...not ultimately reduce red tape as it removes the very means by which unnecessary red tape can be eliminated or reduced across the

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18 *Submission 112*, p. 11.

19 See, for example, *Submission 113*.

20 *Submission 52*, p. 9.

21 *Submission 7*, p. 2.

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Commonwealth and other jurisdictions; and eliminates important information sharing arrangements.<sup>22</sup>

1.22 The signatories to an open letter to the Prime Minister reinforced the message that removing the ACNC was a retrograde step:

The Australian Government intends to shut down the ACNC as soon as it can, and in the meantime, cut its funding and capacity. It is planning to return the key role of determining charitable status to the Australian Taxation Office, re-creating a conflict of interest. This approach is, at best, an unfortunate policy for charities across Australia and our community. Red tape will continue to grow, the size of the bureaucracy will grow, and services to the sector and the public will be reduced.<sup>23</sup>

1.23 Furthermore, the ACNC pointed out that 'a return of regulatory functions back to ATO and ASIC would mean a return to the same regulatory deficiencies, the loss of a specialist regulator and unnecessary transitional costs for charities'. It would also mean a significant loss of public transparency and accountability.<sup>24</sup>

## Conclusion

1.24 The Labor members found the evidence in favour of retaining the ACNC compelling—not only because of the sheer numbers of charities and other organisations that strongly supported the work of the ACNC but because of the soundness of their arguments.

1.25 In its very short life, the ACNC has already registered impressive achievements, maintained strong support for its work and has shown itself flexible and accommodating through the transition period. It has been especially willing to develop mechanisms to assist highly regulated organisations to minimise their administrative burden.

## Recommendation 1

**1.26 The Labor Senators recommend that the bill not proceed.**

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22 *Submission 52*, p. 10.

23 Open Letter to Government: Retain Charity Regulator—18 March 2014, <http://www.communitycouncil.com.au/node/165>

24 *Submission 95*, p. iv.

**Recommendation 2**

**1.27 The Labor Senators recommend further that the ACNC and the bodies that are already highly regulated continue their efforts to establish ways to avoid duplication of effort and to remove 'red tape'.**

**Senator Mark Bishop  
Deputy Chair**

**Senator Louise Pratt  
Senator for Western Australia**

## **Dissenting Report by Australian Greens**

1.1 The Australian Greens do not support the repeal of the Australian Charities and Not-for-profits Commission (ACNC).

1.2 The not-for-profit reform process undertaken by the 43rd Parliament was the end result of a lot of hard work from people across the sector who were committed to seeing the principles of a vibrant, diverse and independent civil society underpinned by legislation.

1.3 The Australian Greens acknowledge that any reform process is a work in progress and there have been issues with the commencement of the ACNC, but the Commission and its associated legislation is supported by the large majority of the sector. About 80 per cent of the submissions favour the retention of the ACNC; about 10 per cent express support for the principles underpinning its establishment but are agnostic on the question of whether the ACNC or some new entity carries out the regulatory function; and only 10 per cent advocate its abolition.

1.4 Establishing the ACNC was a significant step towards the modernisation needed to ensure organisations are better equipped to operate in the 21st century. As a new body the ACNC is settling into its role and has not always struck the right balance between its regulatory functions and its red-tape reduction functions. This is not a good enough reason to repeal the ACNC altogether – rather, it highlights that it is important that government works with the sector to improve the ACNC, rather than taking the backwards step of destroying it.

1.5 The Greens supported the creation of the ACNC because it is important to our community to have a vibrant charity sector that delivers a range of important services to hundreds of thousands of people and the environment, and lead the debate on important issues such as inequality and poverty. Community and charity organisations work hard to serve, defend and promote the broader needs of our community, and need to remain strong and independent to do their best work.

1.6 The not-for-profit sector is on the front line when it comes to dealing with the impacts of social policies, such as the cuts to income support in the recent Budget and above all else, the Greens are committed to the sector and ensuring its long term independence. Promoting a vibrant, diverse and independent sector is one of the three objectives of the ACNC, and the Greens are deeply concerned that this principle will not be carried forward into any alternative bodies proposed by the Government.

1.7 Unfortunately, it is still impossible to assess exactly how the repeal will affect the sector because the Government has released very little detail about the proposed replacement.

1.8 This is concerning in itself, because repealing the dedicated regulator without having undertaken appropriate consultation or developed a clear alternative demonstrates an inherent lack of respect for the broad role that charities play in our community.

1.9 This inquiry has confirmed that Social Services Minister Kevin Andrews has undertaken "informal consultations" about the process of repealing the ACNC and the possible form its replacement might take. However, an informal consultation process is highly subjective and often fails to properly account for and resolve differences of opinion among stakeholders.

1.10 Before any decision on the ACNC's future was made, the Government should have undertaken a full and proper open process of consultation that reaches out to the sector and encourages their extensive involvement. This should have included the opportunity for providers to prepare and lodge submissions and for hearings and consultations to be undertaken around the country.

1.11 This has not occurred, and because the Government has not yet developed a replacement for the ACNC, any move to scrap the regulator will only lead to confusion and instability across the not-for-profit and charity sector.

1.12 This disregard for the input of the sector and lack of process or planning is a key reason why the Australian Greens are opposed to this legislation proceeding.

1.13 The lack of a replacement body also means that abolishing the ACNC at this point in time would see the work of assessing charitable status and not-for-profit regulation handed back to the Australian Taxation Office (ATO).

1.14 The ACNC was developed in response to both the complexity and the lack of transparency that was associated with assessments undertaken by the ATO. Returning to this arrangement cannot deliver simplified administration and a reduction in red tape.

1.15 Mr Robert Fitzgerald's evidence to the inquiry demonstrated that returning these powers to the ATO would actually further entrench a failed regulatory system, rather than improve on the work that has been undertaken so far.

1.16 Furthermore, the ATO's role as both the decision maker on charitable status and the government's revenue collector is likely to leave the sector as the losers.

1.17 There is clearly overwhelming support in the sector for an independent regulator and rejection of the ATO becoming the regulator again and for these reasons the Australian Greens do not support this backwards step of returning any of the ACNC's powers to the ATO.

1.18 The ACNC also has a specific role in reducing red tape and has to report to Parliament on its progress towards this outcome. The creation of the ACNC also enabled a national approach to reducing the multiple compliance reporting and

regulatory requirements of the different state and territories currently impose. Although the ACNC began its first round of data collection in a manner that increased rather than reduced the red-tape burden in the short term for some organisations, there has been open dialogue around the purpose of that data collection and improvements made. There is no demonstration that the ACNC is not going to deliver on this responsibility. Nor is it clear that the process the Government talks about will ensure good governance, accountability, transparency and streamlining of reporting.

1.19 Removing the body that is set up to streamline compliance obligations will, in the longer term, just make things harder for many organisations.

1.20 For all of these reasons, the Australian Greens recommend that this legislation not be passed.

**Senator Rachel Siewert**  
**Senator for Western Australia**



# APPENDIX 1

## Submissions received

<b>Submission Number</b>	<b>Submitter</b>
1	Westworth Kemp Consultants
2	Ms Emma Tomkinson
3	Queensland Association of Independent Legal Services Inc. and the Federation of Community Legal Services (Vic) Inc.
4	The Fielding Foundation
5	Incredible Ltd
6	Mr Max Bourke AM
7	Queensland Law Society
8	Mr Melville Miranda
9	The Shepherd Centre
10	Australian Women's Health Network
11	Associated Christian Schools
12	Add-Ministry Inc.
13	Riverview Church
14	Aged and Community Services NSW and ACT
15	Australian Catholic Religious Against Trafficking in Humans
16	Creating Australia
17	Uniting Church in Australia National Assembly
18	Institute of Chartered Accountants Australia
19	National Disability Services
20	CPA Australia
21	Law Council of Australia
22	Logicca Pty Limited
	• Supplementary Submission

23	All Together Now
24	Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology
25	Ms Rowena Skinner
26	The Synergy XChange Ltd
27	Conservation Council of South Australia
28	Better Boards Australasia
29	Effective Governance Pty Ltd
30	Churches of Christ of Community Care in Victoria and Tasmania
31	Blue Mountains and Lithgow Integrated Neighbourhood Network
32	Mr John Butcher
33	MGI Australasia
34	Legacy Australia Council
35	UnitingCare Australia
36	Western Australian Council of State School Organisations Inc.
37	Housing Industry Association Ltd
38	Ms Elizabeth Eaton
39	The Reach Foundation
40	The Difference
41	Mr Carlo Silipo
42	Mr John Church
43	Dr Ted Flack
44	Our Community
45	Neumann and Turnour Lawyers
46	Women's and Children's Hospital Foundation
47	Philanthropy Australia
48	Association Executive Services
49	Ms Wesa Chau

50	Australian and New Zealand Third Sector Researchers
51	Hanrick Curran Audit Pty Ltd
52	Mr Robert Fitzgerald AM
53	Federation of Victorian Traditional Owner Corporations
54	Native Title Services Victoria Ltd
55	National Native Title Council
56	Mr Gary James Potts
57	Entrust Foundation
58	Catholic Health Australia
59	Centre for Civil Society
60	St Vincent de Paul Society, National Council of Australia
61	Governance Institute of Australia Ltd
62	Community Employers WA
63	The Smith Family
64	Mr Colin Brennan
65	RDL Accountants
66	Corney and Lind Lawyers Pty Ltd
67	The Wilderness Society (South Australia) Inc.
68	The Wilderness Society Qld Inc.
69	The Wilderness Society Tasmania Inc.
70	Ms Elizabeth Cham
71	Australian Ethical Investment Ltd
72	Association of Australian Medical Research Institutes
73	South Australian Council of Social Service
74	Moore Stephens Australia
75	Breast Cancer Network Australia
76	Australian Catholic Bishops Conference

77	World Vision Australia
78	Local Community Services Association
79	Performance Partners
80	PricewaterhouseCoopers
81	Mr Raymond Budge
82	Australian Conservation Foundation
83	Australian Cervical Cancer Foundation
84	Lark Philanthropy
85	Reynolds Sullivan and Associates Pty Ltd
86	The Myer Family Company Ltd
87	Church Communities Australia
88	YWCA Australia
89	Community Council for Australia
90	Law Institute of Victoria
91	Community and Public Sector Union
92	Asia-Pacific Centre for Social Investment and Philanthropy, Swinbourne University of Technology
93	Amnesty International Australia
94	Australian Institute of Company Directors
95	Australian Charities and Not-for-profits Commission
	• Supplementary Submission
96	Independent Schools Council of Australia
97	Australian Association of Christian Schools
98	Mr Robert Cameron
99	Dr Marina Nehme, Faculty of Law, University of New South Wales
100	Institute of Public Accountants
101	Department of Social Services

102	Financial Services Council
	• Supplementary Submission
103	Universities Australia
104	Women's Legal Service Victoria
105	Australian Marine Conservation Society
106	Consumers Health Forum of Australia
107	War Widows' Guild of Australia NSW Ltd
108	The Community Brave Foundation
109	ACT Government
110	Volunteering Australia
111	Good Beginnings Australia
112	Australian Council of Social Service
113	Justice Connect
114	Professor David Gilchrist, Curtin Not-for-profit Initiative
115	Moore's Legal Pty Ltd
116	Cancer Council Queensland
117	Humane Society International
118	Neuroscience Research Australia
119	Life Activities Clubs Victoria Inc.
120	Fundraising Institute of Australia
121	Sustainability Showcase
122	RSPCA Australia
123	Save the Children Australia
124	Anglicare Australia
125	John Pierce Centre
126	Ms Stacey O'Brien
127	Mr Andrew Cox

128	Ms Sue Cooke
129	William Buck (NSW) Pty Limited
130	Cult Information and Family Support Inc.
131	Australian Major Performing Arts Group
132	Catholic Education Offices of Melbourne, Ballarat, Sale and Sandhurst
133	Anglican Church Diocese of Sydney
134	Jesuit Social Services
135	Australian Baptist Ministries
136	National Catholic Education Commission
137	Australian Christian Lobby
138	Mr Robert Wright
139	Mr Peter Haggstrom
140	Ms Helen Styles
141	Ms Sarah Moles
142	Mr David Zwolski
143	Mr Neil Davidson
144	Ms Taya Seidler
145	Paxton-Hall Lawyers Pty Ltd
146	Creating Australia
147	Professor Myles McGregor-Lowndes
148	Mr Tom Dickson
149	The Not-for-Profit Project, University of Melbourne Law School
150	Ms Esther Rockett
151	Jobs Australia
152	Australian Council for International Development
153	Prolegis Lawyers
154	Australian Securities and Investments Commission

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Dr Joyce Chia

- Response received from the Catholic Archdiocese of Sydney



## **APPENDIX 2**

### **Additional information received**

- Additional information received from Justice Connect on 27 May 2014, relating to the public hearing held in Canberra on 23 May 2014.
- Additional information received from Governance Institute of Australia on 30 May 2014, relating to the public hearing held in Canberra on 23 May 2014.
- Additional information received from Professor David Gilchrist, Director, Curtin Not-for-profit Initiative, on 2 June 2014, relating to the public hearing held in Canberra on 23 May 2014.
- Additional information received from Professor Ann O'Connell, Melbourne Law School, on 12 June 2014, relating to the public hearing held in Canberra on 23 May 2014.
- Additional information received from Prolegis Lawyers on 12 June 2014, relating to the public hearing held in Canberra on 23 May 2014.
- Answers to questions on notice from a public hearing held in Canberra on 23 May 2014, received from the Association of Australian Medical Research Institutes on 2 June 2014.
- Answer to a question on notice from a public hearing held in Canberra on 23 May 2014, received from the Department of Social Services on 13 June 2014.



# **APPENDIX 3**

## **Public hearing and witnesses**

**CANBERRA, 23 MAY 2014**

BAIRD, Mr Murray, Assistant Commissioner General Counsel,  
Australian Charities and Not-for-profits Commission

BRAGG, Mr Andrew, Director, Policy and Global Markets,  
Financial Services Council

BROWN, Ms Eve, Senior Policy Manager and Legal Counsel,  
Financial Services Council

CROSBIE, Mr David, Chief Executive Officer, Community Council for Australia

DEN ELZEN, Dr Nicole, Executive Officer,  
Association of Australian Medical Research Institutes

EVANS, Mr Greg, Deputy Chief Executive, Universities Australia

FITZGERALD, Mr Robert AM, Private capacity

GOTTS, Mr Robert, Director, Community Sector Reform Project,  
Community Services Directorate, Australian Capital Territory Government

HERSH, Mr Peter, Private capacity

LUCAS, Rev. Brian, General Secretary, Australian Catholic Bishops Conference

PASCOE, Ms Susan, AM, Commissioner,  
Australian Charities and Not-for-profits Commission

REDDEL, Dr Tim, Group Manager, Programme Office,  
Department of Social Services

SHANNON, Mr Martin Joseph (Joe), Director, Moore Stephens Australia

VASSAROTTI, Ms Rebecca, Acting Deputy Chief Executive Officer,  
Australian Council of Social Service

WISHART, Mr Roewen, Foundation Director, Neuroscience Research Australia

WOODWARD, Ms Sue, Director, Policy and Education,  
Australian Charities and Not-for-profits Commission

WOOLLEY, Ms Trish, Branch Manager, Civil Society and Program Delivery Branch,  
Department of Social Services