

# 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.

