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.[1]

2.3 One of ACNC's statutory objects is to 'promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector'.[2] 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

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

> tape imposed on business, community organisations and individuals by at least $1 billion a year.[3]

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.[4]

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...[5]

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.[6]

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.[7]

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.[8]

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).[9]

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.[10]

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*.[11]

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'.[12] 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.[13]

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.[14]

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.[15]

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.[16]

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.[17]

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.[18]

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 oversighting 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.[19]

2.21 Of course, whether this burden is justified depends, as mentioned in the ACNC Commissioner's testimony to the hearing,[20] 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.[21]

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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.[22]

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.[23]

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.[24]

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.

> 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.[25]

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.[26]

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.[27]

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.[28]

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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.[29]

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.[30]

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.[31]

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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.[32]

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.[33]

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.[34]

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:
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> - 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.[35]

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.[36]

ACNC's involvement in national harmonisation

2.42 The ACNC reports some progress in harmonisation.[37] 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.[38]

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....

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.

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

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.[40] 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.[41]

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?[42]

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'.[43]

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).[44]

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.[45]

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.

> Commissioner in the absence of a proper court process that ensures due process and the application of the rules of evidence.[46]
>
> …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.[47]

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.[48]

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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.[49]

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'[50]

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'.[51] Mr Hersch 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.[52]

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.[53]

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.[54]

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.[55]

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.[56]

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.[57]

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.[58]

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.[59]

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.[60]

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.[61]

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.[62]

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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'.[63] The Minister has also announced his intention to consult with stakeholders about the establishment of the NCE.[64]

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.[65]

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'.[66]

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.[67]

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.[68]

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.[69]

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.[70]

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.[71]

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.[72]

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.[73]

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.[74]

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.[75]

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.[76]

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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.[77]

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.[78]

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'.[79]

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.