


# Regulatory Impact Assessment of Potential Duplication of Governance and Reporting Standards for Charities

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Friday, 25 January 2013

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The Council of Australian Governments (COAG) releases the consultation regulatory impact assessment (RIA) to examine ways to reduce regulatory duplication between the proposed Commonwealth governance and reporting standards and existing State and Territory requirements for charities registered with the Australian Charities and Not-for-profits Commission. The RIA process provides stakeholders with an opportunity to provide feedback on proposed options that would address potential regulatory duplication.

Closing date for submissions: **21 February 2013**. Submissions should be sent to:

Email: [NFPReform@treasury.gov.au](mailto:NFPReform@treasury.gov.au)

Mail: Manager

Philanthropy and Exemptions Unit

Indirect, Philanthropy and Resource Tax Division

The Treasury

Langton Crescent

PARKES ACT 2600

Submissions will be made publicly available online at <http://www.treasury.gov.au/Policy-Topics/PeopleAndSociety/NFP-reform/COAG-NFP-Reform-Working-Group> unless there are specific requests for some or all of a submission to be kept confidential.

The outcomes from this consultation will feed into a final report containing a range of options to reduce regulatory duplication. This report is to be provided to COAG in early March 2013.

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See <http://www.coag.gov.au/node/492> (accessed 3 February 2013)

Council of Australian Governments

REGULATORY IMPACT ASSESSMENT OF POTENTIAL DUPLICATION  
OF GOVERNANCE AND REPORTING STANDARDS FOR CHARITIES

January 2013

# MAKING A SUBMISSION

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This consultation regulatory impact assessment (RIA) is examining ways to reduce regulatory duplication between the proposed Commonwealth governance and reporting standards and existing State and Territory requirements. The RIA process provides stakeholders with an opportunity to provide feedback on proposed options that would address potential regulatory duplication.

The focus of this consultation RIA is the extent of regulatory duplication for entities currently regulated by both the Australian Charities and Not-for-profits Commission (ACNC) and state/territory regulators.

## **Closing date for submissions on duplication: 21 February 2013**

Email:	<a href="mailto:NFPReform@treasury.gov.au">NFPReform@treasury.gov.au</a>
Mail:	Manager Philanthropy and Exemptions Unit Indirect, Philanthropy and Resource Tax Division The Treasury Langton Crescent PARKES ACT 2600

While submissions may be lodged electronically or by post, electronic lodgement is preferred. Stakeholders should note in their submissions, where relevant, their entity type and jurisdictions in which they operate.

Submissions will be made publicly available online at <http://www.treasury.gov.au/Policy-Topics/PeopleAndSociety/NFP-reform/COAG-NFP-Reform-Working-Group> unless there are specific requests for some or all of a submission to be kept confidential.

## **FINAL REPORT TO COUNCIL OF AUSTRALIAN GOVERNMENTS ON REGULATORY DUPLICATION**

The outcomes from this consultation will feed into a final report containing a range of options for jurisdictions to consider ways to reduce regulatory duplication. This report is to be provided to Council of Australian Governments (COAG) by the Standing Council on Federal Financial Relations in early March 2013.

## **OTHER CONSULTATIONS ON GOVERNANCE AND FINANCIAL REPORTING**

### **Commonwealth consultation**

The Commonwealth is also consulting separately on the detail of the proposed ACNC [Governance Standards](#) and the [Financial Reporting](#) requirements and is particularly interested in stakeholder views on the broader costs and benefits of the ACNC regulations. Consultation on the governance standards and reporting requirements has a broader scope than the issue of regulatory duplication considered in this RIA. Stakeholders are able to provide feedback on both consultation processes.

Consultation papers on the proposed ACNC governance standards and draft financial reporting regulations were released on 17 December 2012. Comments on both of these papers are due by **15 February 2013**. Papers and submissions are available at [www.treasury.gov.au](http://www.treasury.gov.au) or by clicking the links above.

The Office for the Not-for-Profit Sector in the Department of the Prime Minister and Cabinet is also administering an online forum on the proposed governance standards as a way of providing the sector with another mechanism to make comment. Comments can be posted to [Governance Forum](#) until **15 February 2013**.

### **ACNC National Community Presentation Program**

The ACNC is commencing a national tour on 29 January and running through to 13 February 2013. These face-to-face sessions will provide an introduction to the ACNC, as well as the opportunity to discuss how the new regulator intends to use its powers.

Most sessions will also be attended by officials from the Commonwealth Treasury seeking feedback as part of the Commonwealth's consultations on governance and financial reporting. Information about these consultations is available at [ACNC Consultations](#).

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# EXECUTIVE SUMMARY

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## DUPLICATION IN REGULATING CHARITIES

The Australian Charities and Not-for-profits Commission (ACNC) commenced operations in December 2012. The *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) sets out eligibility for a not-for-profit (NFP) entity to be registered as a charity and establishes governance standards and reporting requirements that registered entities must meet for continuing registration. Registration is a prerequisite for access to Commonwealth tax concessions and for some other purposes.

State and Territory governments have legislation that regulates charities that adopt a particular legal form, namely incorporated associations and cooperatives and (to a lesser extent) charitable trusts. The legislation sets out some governance requirements and some reporting requirements. These requirements differ between jurisdictions<sup>1</sup> and also differ from the proposed governance standards and reporting requirements under the ACNC Act.

While the proposed governance standards and reporting requirements will apply from 1 July 2013, impacts of duplication will not occur until transitional arrangements expire. Transitional arrangements for reporting extend into 2015 and transitional arrangements where charities may make changes to governing rules extend into 2017.<sup>2</sup>

## IMPACT OF PROPOSED GOVERNANCE AND REPORTING ARRANGEMENTS

The Productivity Commission report, *Contribution of the not-for-profit sector*<sup>3</sup> (2010), found that a major source of concern for the sector was inconsistencies between similar legal forms and the cost of complying with differing legislation. Over the past decade, reviews<sup>3</sup>

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<sup>1</sup> In relation to cooperatives, a level of uniformity is being pursued under the *National Partnership Agreement for a Seamless National Economy*. Implementation of a uniform cooperatives law is expected by May 2014 (see the December 2012 Communique of the COAG Legislative and Governance Forum on Consumer Affairs:

<http://www.consumerlaw.gov.au/content/CAF/meetings/downloads/003.pdf>).

<sup>2</sup> Transitional arrangements in relation to reporting give the ACNC Commissioner a discretion to modify the requirements until the end of the transitional period. The arrangements are discussed further in the Impact Analysis section of the RIA.

<sup>3</sup> 2001 Report of the inquiry into the Definition of Charities and Related Organisations; 2008 Senate Economics Committee inquiry into Disclosure Regimes for Charities and NFP Organisations; 2009 Australia's Future Tax System report; 2010 Productivity Commission Report on the Contribution of the NFP Sector and 2010 Senate Economic Committee's inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010.

have consistently recommended that the regulation of the NFP sector in Australia would be significantly improved by harmonising and simplifying regulatory arrangements.

### **Purpose and broader context**

The purpose of this paper is to identify and quantify the extent of **duplication** between existing and proposed governance standards and reporting requirements on charities, with a view to assisting a final report to COAG to determine whether it is a problem that would warrant government action. Assuming that a conclusion can be reached that there is a problem that would warrant government action, this paper also seeks stakeholder feedback on options that might address duplication.

This paper does not quantify any potential **additional** regulatory burden (or compliance savings) that may be imposed (or generated) by the new arrangements. In particular, it does not quantify the costs or benefits of:

- (1) imposing governance and financial reporting requirements on entities currently not subject to any such requirements (such as unincorporated associations);
- (2) changes made to Commonwealth only regulated entities (such as companies limited by guarantee); or
- (3) opportunities for other regulatory requirements outside of the scope of the ACNC to be improved as a consequence of the creation of the ACNC (such as simplification of fundraising laws).

As noted above under 'Making a Submission', the Commonwealth is also consulting separately on the detail of the proposed [Governance Standards](#) and the [Financial Reporting requirements](#) and is particularly interested in stakeholder views on the broader costs and benefits of the ACNC regulations. In addition to accepting written submissions;

- a. [face-to-face consultation forums facilitated by the ACNC](#) will be held around Australia on the draft governance standards and financial reporting regulations in late January — early February 2013; and
- b. the Office for the Not-for-Profit Sector within the Department of the Prime Minister and Cabinet will also administer a forum on [www.notforprofit.gov.au](http://www.notforprofit.gov.au) to facilitate discussion on the draft governance standards.

Stakeholders are able to provide feedback through all consultation processes. The intention is to ensure that the consultation on the governance standards and reporting requirements has a broader scope than the issue of regulatory duplication considered in this RIA.

Finally, some states and territories are conducting reviews of their regulation of charities and other NFPs in light of the introduction of the ACNC. For example, South Australia has announced that it will make amendments to its incorporated associations and charitable collections legislation to reduce regulatory duplication for incorporated associations which

register as charities with the ACNC and also those charities collecting for charitable purposes registered with the ACNC.

The proposed ACNC governance standards and reporting requirements seek to improve transparency and accountability of charities and, at a later date, the broader NFP sector. The RIS accompanying the ACNC Act noted NFPs face multiple (and often conflicting) informational requirements, diverting scarce resources from the core purpose of the entity towards administration and compliance expenses.<sup>4</sup> The purpose of this RIA is to commence the process of developing an evidence base around areas of duplication to allow COAG to decide whether there is a need for government action and to propose options to reduce the compliance burden on charities from duplication in governance and reporting.<sup>5</sup>

This RIA supports the work of COAG to minimise regulatory compliance costs on the NFP sector. Submissions will feed into a final report to COAG which, assuming that the problem warrants government action, will set out the options to reduce or eliminate compliance burdens associated with regulatory duplication. The final report will be completed in March 2013 to ensure its findings can be taken into account before the governance and financial reporting regulations are tabled in Parliament.

#### **Governance standards<sup>6</sup>**

The ACNC Act imposes governance standards on registered entities.<sup>7</sup> The extent of duplication in governance standards varies across jurisdictions and entity type.<sup>8</sup>

##### ***Standard 1 – purposes and not-for-profit nature of a registered entity***

There is no duplication for incorporated associations, cooperatives and charitable trusts from this standard (paras [30] to [33] and App A). Unincorporated associations and other bodies will also be required to comply but are not subject to State or Territory legislation, so no duplication arises for these charities.

##### ***Standard 2 – accountability to members***

There is some duplication for incorporated associations and cooperatives but little compliance burden from this standard (paras [34] to [37] and App B). Standard 2 does not

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<sup>4</sup> ACNC Act, RIS para 1.12.

<sup>5</sup> Commonwealth and State or Territory governance and reporting requirements that arise from grant funding or contracts for service delivery are not included in the analysis.

<sup>6</sup> More detail on the impact of the governance standards is provided in paras [30] to [53] and Appendices A to F.

<sup>7</sup> Basic religious charities are not subject to the governance standards: s 45-15(5) ACNC Act.

<sup>8</sup> See App K for more detail.



apply to charitable trusts which do not have 'members'. Unincorporated associations and other bodies will be required to comply but are not subject to State or Territory legislation, so no duplication arises for these charities.

***Standard 3 – compliance with Australian law***

Registered entities must not engage in (serious) illegal activity. No compliance burden arises for charities from this standard (paras [38] to [39] and App C).

***Standard 4 – responsible management of financial affairs***

There is some duplication for incorporated associations, cooperatives and charitable trusts from this standard. If those entities are managing the financial affairs of the charity responsibly there will be no compliance burden (paras [40] to [43] and App D). Unincorporated associations and other bodies are not subject to State or Territory legislation, so no duplication arises for these charities.

***Standard 5 – suitability of responsible entities***

There is some duplication with the requirements relating to eligibility for office holders and some additional requirements for incorporated associations from this standard, leading to minor additional compliance burden. The requirements under State and Territory legislation for cooperatives are almost identical from this standard across jurisdictions so that although there is duplication for cooperatives this will not impose any compliance burden (paras [44] to [48] and App E). Legislation dealing with charitable trusts in the States and Territories does not deal with qualification of trustees. Unincorporated associations and other bodies are not subject to State or Territory legislation, so no duplication arises for these charities.

***Standard 6 – duties of responsible entities***

This is the most significant area of duplication for incorporated associations. This standard also leads to some duplication for cooperatives (paras [49] to [53] and App F). Charitable trusts, unincorporated associations and other bodies are not subject to State and Territory legislation, so no duplication arises for these types of charities.

**Reporting requirements**

The ACNC Act imposes some reporting obligations on all registered charities and additional financial reporting obligations on medium and large registered charities.<sup>9</sup> The extent of duplication in reporting obligations varies across jurisdictions and entity type.

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<sup>9</sup> See paras [54] to [102] and Appendices G to J for more detail.

### ***Entity tiers***

The entity tiers will determine which registered charities are required to lodge an Annual Financial Statement. For the 2012-13 financial year, registered charities are only required to lodge a transitional Annual Information Statement (without any financial information). At the end of the transitional period, this requirement will lead to duplication for incorporated associations in all States and Territories. Cooperatives with annual revenue of more than \$250,000 face some duplication in reporting. Charitable trusts, unincorporated associations and other bodies are not subject to State and Territory legislation, so no duplication arises for these types of charities (paras [57] to [67] and App G).

### ***Annual information statements***

The Annual Information Statement is an additional reporting requirement for all charities, but does not lead to duplication because there is no similar requirement at State and Territory level (paras [68] to [74] and App H).

### ***Annual financial statements***

Only medium and large registered charities are required to lodge an Annual Financial Statement. At the end of the transitional period, there will be some duplication for medium and large incorporated associations and cooperatives (those with annual revenue of more than \$250,000). Charitable trusts, unincorporated associations and other bodies are not subject to State and Territory legislation, so no duplication arises for these types of charities (paras [75] to [86] and App I).

### ***Other reporting obligations***

The ACNC Act requires registered charities to notify the ACNC of certain changes of particulars (paras [89] to [92] and App J). There are also some Additional Reporting obligations (paras [93] to [97]) and App J) although these are only likely to be relevant where there is reason to believe that a registered entity has contravened the ACNC Act.<sup>10</sup> There is also the opportunity for certain groups of registered charities to lodge a group financial report (paras [98] to [102] and App J).

Some duplication arises for incorporated associations and cooperatives from the requirement to lodge changes of particulars with both the ACNC and the relevant State or Territory regulator.

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<sup>10</sup> See Revised Explanatory Memorandum, ACNC Bill 2012, para 6-65.

Incorporated associations legislation may require additional reporting but, as noted, this is likely to be used infrequently. There are no provisions that allow for group reporting by incorporated associations.

Cooperatives legislation in the States and Territories does not provide for additional reporting but does allow for group reporting.

Unincorporated associations and other bodies are not subject to State and Territory legislation, so no duplication arises for these charities.

**TABLE 1: COSTS OF REGULATORY DUPLICATION BY JURISDICTION**

The table below presents an estimate of the compliance burden that arises from the duplication between existing regulatory requirements of States and Territories and the proposed ACNC governance and reporting requirements. This estimate of regulatory duplication costs relates to estimated costs incurred by incorporated associations and cooperatives on a per-annum and/or once-off basis.

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	National
<b>One-off costs</b>									
<i>Incorporated associations</i>	\$59,889	\$532,989	\$52,304	\$348,758	\$273,402	\$83,463	\$-	\$297,537	\$1,648,343
<i>Cooperatives</i>	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-
<i>One-off costs (subtotal)</i>	\$59,889	\$532,989	\$52,304	\$348,758	\$273,402	\$83,463	\$-	\$297,537	\$1,648,343
<b>Ongoing costs (per year)</b>									
<i>Incorporated associations</i>	\$336,772	\$1,509,527	\$122,978	\$933,419	\$1,282,639	\$210,522	\$1,256,642	\$7,643,190	\$13,295,690
<i>Cooperatives</i>	\$617	\$32,139	\$418	\$11,777	\$5,889	\$1,915	\$36,853	\$4,690	\$94,296
<i>Ongoing costs (subtotal)</i>	\$337,389	\$1,541,666	\$123,396	\$945,196	\$1,288,528	\$212,438	\$1,293,495	\$7,647,880	\$13,389,986
<b>Total*</b>	<b>\$397,277</b>	<b>\$2,074,655</b>	<b>\$175,700</b>	<b>\$1,293,953</b>	<b>\$1,561,930</b>	<b>\$295,901</b>	<b>\$1,293,495</b>	<b>\$7,945,417</b>	<b>\$15,038,329</b>
One-off per entity (all sizes)**	\$112	\$76	\$159	\$89	\$123	\$121	\$-	\$101	
Ongoing per entity (all sizes) **	\$633	\$221	\$377	\$241	\$583	\$310	\$261	\$2,600	

\* Costs incurred in the first year

\*\* This figure indicates the difference in cost per entity between States and Territories (which have different numbers of charities). It does not take into account the significant variation between entity type and size. This figure has been calculated by dividing the one-off or ongoing sub total by the total number of incorporated associations and cooperatives in each State or Territory (using the revised ATO data).

## **OPTIONS TO REDUCE DUPLICATION**

This RIA identifies the impact on charities of duplication between the ACNC regulatory requirements and those of the States and Territories, then considers five options for addressing this duplication. Each option would require action by either the Commonwealth or a State or Territory (or both) to change the way in which they regulate charities. The options vary in the extent to which they address duplication. The options highlight how this duplication affects charities and how changes can reduce this burden for charities.

# DUPLICATION FROM DIFFERENT LEVELS OF GOVERNMENT

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## DECISION TO ESTABLISH THE ACNC

1. Following a scoping study for a national 'one-stop shop regulator' for the sector, the Commonwealth announced the establishment of the ACNC in its 2011 Budget. As part of this announcement, it committed to continuing discussions with states and territories on national regulation for the charitable sector, recognising that the greatest reduction in red tape could only be achieved with national coordination.
2. At its meeting in July 2012, COAG reconfirmed the objective of minimising regulatory compliance costs to the sector and agreed to consider the results of a regulatory impact assessment on governance and reporting standards in the not-for-profit sector, in light of the (then) proposed ACNC Bill.

## ROLE OF THE AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION

3. The Australian Charities and Not-for-profits Commission (ACNC) commenced operations on 3 December 2012 to register certain entities (a prerequisite for access to Commonwealth tax concessions and other benefits), administer a national regulatory framework and assist registered entities through the provision of guidance and education. Initially, the ACNC will only regulate entities that are charities that wish to access Commonwealth tax concessions and other benefits.
4. The Charities Definition Inquiry Report in 2001 recommended an 'independent administrative body for charities and related entities' (Rec 25). The Productivity Commission Report in 2010 on Contribution of the Not-for-profit Sector recommended a 'one-stop shop' for Commonwealth regulation of NFP entities. There have also been other reviews of the NFP sector: the Senate Economics Committee Inquiry into Disclosure Regimes for Charities and NFP Organisations Report in 2008 and Australia's Future Tax System Review Report in 2009 (the Henry Review). These reviews noted that some NFPs were subject to excessive regulation, especially those operating across multiple jurisdictions, and others, such as unincorporated associations, were unregulated despite access to public donations, government grants and/or tax concessions.
5. The ACNC administers the registration process for the NFP sector, initially confined to charities. The ACNC requires the entity to be a charity (according to the common

law meaning of the term, as affected by the *Extension of Charitable Purpose Act 2004*) and to satisfy certain other requirements. Registration is voluntary but is a prerequisite for access to Commonwealth tax concessions and other benefits and exemptions. The ACNC will maintain the Australian Charities and Not-for-profits Register (ACN Register) and include specified information about each registered, and formerly registered, entity. Initially, only entities that are charities will be able to be registered. The ACNC has automatically registered all entities endorsed by the ATO as charities entitled to Commonwealth tax concessions.

6. The Regulation Impact Statement (RIS) accompanying the ACNC Act noted that the introduction of the national regulatory system for NFPs that are charities seeks to:
  - create a coherent national system that is consistent and based on activities and outcomes rather than entity type. For example, it was noted that, companies limited by guarantee were regulated by the Australian Securities and Investments Commission (ASIC); incorporated associations are regulated by the States and Territories; and most NFPs (unincorporated associations) are not regulated at all (even if claiming Commonwealth tax concessions);
  - streamline regulatory responsibility. It was noted that the ATO, ASIC, the Office of the Registrar of Indigenous Corporations (ORIC), the national housing regulator and agencies that provide grants and contracts for service delivery (such as FaHCSIA) to charities had oversight of specific aspects of the charity's operation;
  - consolidate and harmonise charities' reporting requirements. For example, it was noted that charities may have needed to provide information to the ATO for endorsement for concessional Commonwealth tax treatment and to relevant State or Territory bodies for access to State-based tax concessions. Their financial reporting was based on their legal structure (as required by ASIC or a State or Territory equivalent) as well as information required for government funding or service delivery contracts (as required by various government departments) or to engage in fundraising; and
  - address the informational needs of the Australian public. It was noted that while some charities duplicate their reporting and other requirements; a large number of charities are not subject to any regulation and are not required to provide any information to members or the public about their activities. In some cases, this can 'reduce public confidence, restrict informed choices and philanthropy more generally'.<sup>11</sup>

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<sup>11</sup> ACNC Act, RIS para 16.46.

7. The ACNC Act introduces additional and, in some cases new, requirements for registered charities in the form of governance standards and reporting requirements. As noted at p. 3 the content of the new requirements is subject to separate Treasury consultations. This RIA is confined to identifying and costing duplication with existing State and Territory requirements and identifying ways of reducing or eliminating that duplication.

## **ROLE OF DIFFERENT LEVELS OF GOVERNMENT IN NFP SECTOR**

8. The Commonwealth government has power to make laws to the extent permitted under the *Constitution Act 1901*. In enacting the ACNC Act the Commonwealth relies on a number of different heads of constitutional power but principally the taxation power. Relying on that power the ACNC Act allows registration of charities that wish to access Commonwealth tax concessions. Continuing registration requires compliance with requirements under the ACNC Act such as the proposed governance standards and reporting requirements.
9. State and Territory legislation enables legal forms such as incorporated associations and cooperatives which may also have a legal purpose. An incorporated association with a charitable purpose must comply with the relevant association incorporation laws. A cooperative (with a charitable purpose) must comply with the relevant cooperatives laws. Some charitable trusts must meet requirements under State and Territory trusts laws and State and Territory Supreme Courts have inherent jurisdiction over matters concerned with trusts generally. There may also be State and Territory requirements for access to State and Territory tax concessions and eligibility for fundraising and charitable gaming. (Like the Commonwealth, States and Territories also administer grants and government contracts with NFP organisations (including charities), and these have additional reporting requirements for those organisations although mostly arising from contracts.<sup>12</sup>)
10. Given the roles that both the Commonwealth and the States and Territories play in regulating the NFP sector, the 25 July 2012 meeting of the Council of Australian Governments (COAG) considered a report by the NFP Reform Working Group (NRWG) and reconfirmed the objective of minimising regulatory compliance costs to the NFP sector. In order to progress towards that objective, COAG agreed to consider the results of a regulatory impact assessment on governance and reporting standards in the not-for-profit sector, in light of the (then) proposed ACNC Bill.

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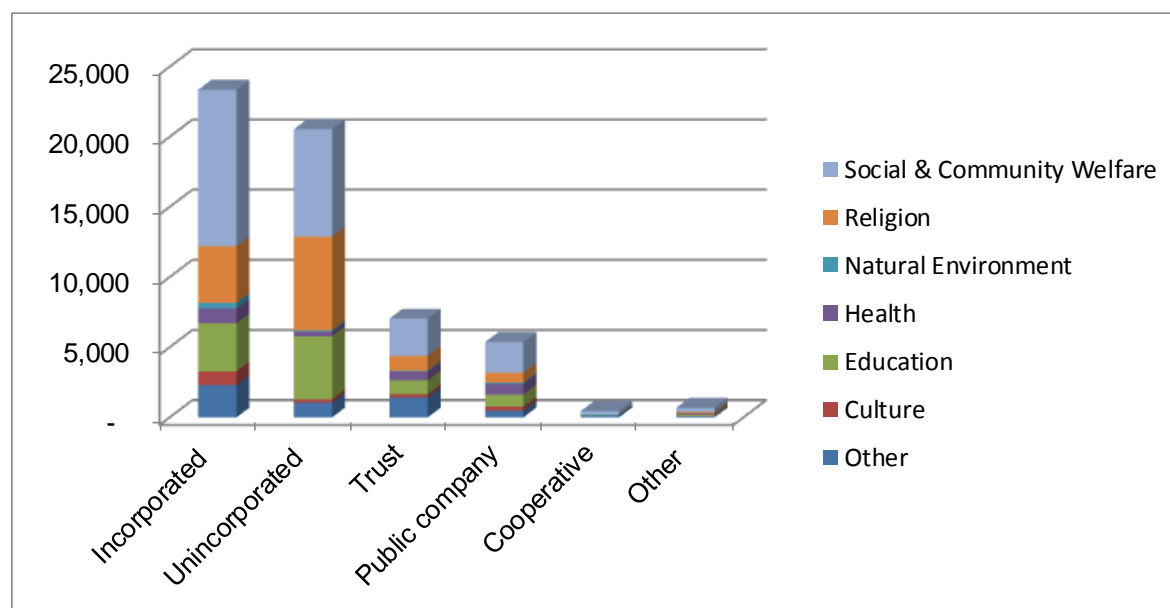
<sup>12</sup> These requirements are not within the scope of this RIA.



## NUMBER AND LEGAL FORM OF CHARITIES

- 11.** Australian charities in different sectors are represented by a variety of forms. As illustrated in the chart below, most Australian charities are incorporated. However, unincorporated entities are also common for charities with the purposes of 'social and community welfare', 'religion' and 'education', with trusts and public companies the next most common entity types.

### AUSTRALIAN REGISTERED CHARITIES – PURPOSE & ENTITY TYPE



**Source:** ATO data (not published).

- 12.** Appendix L provides an indication of the purpose and entity type of registered charities in each State and Territory.

## ENTITIES SUBJECT TO VARIOUS REGULATIONS

- 13.** Currently there are approximately 56,500 charities in Australia that access Commonwealth tax concessions.<sup>13</sup> These charities will now be regulated by the ACNC. They may also be regulated by other Commonwealth agencies or by the States and Territories depending on their legal form. Charities may be:

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<sup>13</sup> According to the ATO, 56,771 charities were endorsed and claiming Commonwealth tax concessions as at 10 December 2012. According to the ACNC website, there are 56,580 registered charities as at 18 January 2013. It is not possible to identify the total number of charities in Australia as many will not seek tax concessions for the Commonwealth or from the States or Territories.

**Companies limited by guarantee**<sup>14</sup> incorporated under the *Corporations Act 2001* (Cth).<sup>15</sup> According to the ATO, as at December 2012, **5,633** such companies access Commonwealth tax concessions (**10% of all charities** entitled to Commonwealth tax concessions);

**Indigenous corporations** incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and regulated by the Office of the Registrar of Indigenous Corporations (ORIC).<sup>16</sup> According to the ACNC **597** 'indigenous corporations' access Commonwealth tax concessions (**1.7% of all charities** entitled to Commonwealth tax concessions);

**Incorporated associations** are incorporated under legislation of a State or Territory. Each State and Territory determines eligibility for incorporation and imposes regulatory requirements.<sup>17</sup> Generally, incorporated associations must have at least five members and be formed for a specific purpose deemed eligible by the relevant jurisdiction. A management committee manages the incorporated association and it must hold an annual general meeting each calendar year. According to the ATO **22,089** incorporated associations with charitable purposes access Commonwealth tax concessions (**39.1% of all charities** entitled to Commonwealth tax concessions);

**Cooperatives** are a form of corporate entity controlled democratically by their members. In cooperatives formed for profit, voting is based on membership rather than on the number of shares held or the value of capital invested. A cooperative can be formed for a charitable (not for profit) purpose. Many cooperatives that have a charitable purpose are affordable housing organisations, often in indigenous communities. All States and Territories in Australia have legislation<sup>18</sup> which enables a cooperative to register and become incorporated as a legal entity and which imposes

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<sup>14</sup> Companies limited by guarantee are public companies without share capital, where each member's liability is limited to a pre-determined amount. Companies limited by guarantee must have at least one member, three directors and an appointed secretary.

<sup>15</sup> There may also be some companies limited by shares registered under the *Corporations Act 2001* (Cth), for example, a business that is wholly owned by a charity that has a similar charitable purpose.

<sup>16</sup> Indigenous associations are also formed outside the CATSI regime under other legal forms.

<sup>17</sup> *Associations Incorporation Act 2009* (NSW); *Associations Incorporation Reform Act 2012* (Vic); *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1987* (WA); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1964* (Tas); *Associations Incorporations Act 1991* (ACT) and *Associations Act 2003* (NT). The law referred to throughout is as at 1 November 2012, unless otherwise stated.

<sup>18</sup> *Cooperatives Act 1992* (NSW); *Cooperatives Act 1996* (Vic); *Cooperatives Act 1997* (Qld); *Cooperatives Act 2009* (WA); *Cooperatives Act 1997* (SA); *Cooperatives Act 1999* (Tas); *Cooperatives Act 2002* (ACT); *Cooperatives Act* (NT) (1997).

regulatory requirements. Cooperatives legislation is similar across jurisdictions and is based on a set of standard provisions developed in 1996 by the Standing Committee of Attorneys-General.<sup>19</sup> According to the ATO **445** cooperatives that have a charitable purpose that access Commonwealth tax concessions (**0.7% of all charities** entitled to Commonwealth tax concessions);

**Charitable trusts** are trusts that are almost always established by deed or under a will, that have a charitable purpose (rather than for the purpose of benefitting named beneficiaries). Unlike ordinary trusts, a charitable trust can exist in perpetuity under common law. Trusts are subject to common law requirements that relate to the fiduciary duties of a trustee and the supervision of State Supreme Courts. Regulation of trusts by legislation enacted by the States and Territories is fairly limited and does not require reporting to a State or Territory agency.<sup>20</sup> Private Ancillary Funds (PAFs) and Public Ancillary Funds (PuAFs) are formed as trusts and must comply with Commonwealth guidelines. According to the ATO **7,144 trusts**<sup>21</sup> access Commonwealth tax concessions as charitable trusts or funds (**12.6% of all charities** entitled to Commonwealth tax concessions);

**Unincorporated associations** are groups of individuals that act together for a common (not business) purpose but do not adopt one of the entity structures above. The association does not have any legal status apart from its members. Unincorporated associations may be entitled to Commonwealth tax concessions but are not subject to State or Territory legislation. According to the ATO **19,998** unincorporated associations access Commonwealth tax concessions (**35% of all charities** entitled to Commonwealth tax concessions);

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<sup>19</sup> Inconsistencies in the cooperatives laws coupled with duplication of regulation for cross-border cooperatives led to the agreement to introduce a Cooperatives National Law (CNL) scheme. Development of the CNL is being led by NSW, which in May 2012 passed the *Cooperatives (Adoption of National Law) Act 2012*. The Act has not yet commenced and will not commence until the Cooperatives National Regulations have been agreed and introduced. All States and Territories, with the exception of Western Australia, South Australia and Northern Territory, have agreed to adopt the CNL and have until 18 May 2014 to secure proclamation of the same law or alternative consistent law. Western Australia, South Australia and the Northern Territory have agreed to enact consistent legislation.

<sup>20</sup> *Trustee Act 1925* (NSW); *Trustee Act 1958* (Vic); *Trusts Act 1973* (Qld); *Trustees Act 1962* (WA); *Trustee Act 1936* (SA); *Trustee Act 1898* (Tas); *Trustee Act 1925* (ACT); *Trustee Act* (NT).

<sup>21</sup> According to the ATO, 1085 of these trusts have a corporate trustee and 6059 trusts have a non-corporate trustee. Corporate trustees will be subject to regulation under the *Corporations Act 2001* (Cth).

**Other bodies** may be statutory corporations<sup>22</sup> or those established under Royal Charter, Letters Patent etc. This may include religious entities. Under the ACNC Act “basic religious charities”<sup>23</sup> do not have to comply with governance standards<sup>24</sup> and do not have to file an Annual Financial Statement.<sup>25</sup> Bodies such as statutory corporations and those established under Royal Charter, Letters Patent etc may be subject to requirements under the relevant statute. According to the ATO **515** ‘other companies’ access Commonwealth tax concessions (**0.9% of all charities** entitled to Commonwealth tax concessions).

**14.** The duplication arising from different levels of government is widespread and varies in magnitude. At the Commonwealth level the ACNC now has responsibility for deciding which organisations are charities,<sup>26</sup> however, the ATO remains responsible for administering tax law, including deciding whether other requirements for tax concessions are satisfied.<sup>27</sup> ASIC will continue to incorporate companies limited by guarantee that are charities. Companies limited by guarantee that are registered by the ACNC will not be subject to regulatory duplication issues that may arise for the other types of entities, as regulatory responsibility is being transferred in phases from ASIC to the ACNC.<sup>28</sup> The ACNC and ORIC are also working together to try to reduce the regulatory obligations, particularly for annual reporting. The ACNC is developing an (electronic) Charity Passport to enable authorised government agencies to access information from the ACNC.<sup>29</sup> This will reduce the number of times registered charities need to provide information to Commonwealth government agencies.

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<sup>22</sup> This term does not include 'statutory authorities' which are government agencies exercising specific functions delegated by government, eg the Australian Tax Office or WorkSafe.

<sup>23</sup> Defined s 205-35 ACNC Act.

<sup>24</sup> Section s 45-10(5) ACNC Act.

<sup>25</sup> Section s 60-60 ACNC Act.

<sup>26</sup> Under transitional rules, automatic registration with the ACNC applies to charities that were endorsed by the ATO prior to 10 December 2012 so that entities already recognised as charities at the Commonwealth level do not need to establish eligibility.

<sup>27</sup> See [http://www.acnc.gov.au/ACNC/About\\_ACNC/ACNC\\_role/ACNC\\_regulators/ACNC/Edu/ACNC\\_regulators.aspx?hkey=a8003962-3192-4e80-88f2-221e186e727d](http://www.acnc.gov.au/ACNC/About_ACNC/ACNC_role/ACNC_regulators/ACNC/Edu/ACNC_regulators.aspx?hkey=a8003962-3192-4e80-88f2-221e186e727d).

<sup>28</sup> See ASIC Media Release 011.2012, 4 December 2012, No more ASIC annual review fees for charities: [http://www.acnc.gov.au/ACNC/Comms/Med\\_R/MR\\_011.aspx](http://www.acnc.gov.au/ACNC/Comms/Med_R/MR_011.aspx).

<sup>29</sup> Section s 150-40 ACNC Act.

15. State and Territory government agencies will continue to regulate state-level legal forms, such as incorporated associations, cooperatives and charitable trusts (approximately 52.4% of charities registered with ACNC) through their regulators:

<b>Jurisdiction/Legislation</b>	<b>Regulator</b>
<b>New South Wales</b> <i>Associations Incorporation Act 2009</i> <i>Cooperatives Act 1992</i>	Office of Fair Trading
<b>Victoria</b> <i>Associations Incorporation Reform Act 2012</i> <i>Cooperatives Act 1996</i>	Consumer Affairs Victoria
<b>Queensland</b> <i>Associations Incorporation Act 1981</i> <i>Cooperatives Act 1997</i>	Office of Fair Trading
<b>South Australia</b> <i>Associations Incorporation Act 1985</i> <i>Cooperatives Act 1997</i>	Office of Consumer and Business Affairs
<b>Western Australia</b> <i>Associations Incorporation Act 1987</i> <i>Cooperatives Act 2009</i>	Department of Commerce
<b>Tasmania</b> <i>Associations Incorporation Act 1964</i> <i>Cooperatives Act 1999</i>	Consumer Affairs and Fair Trading
<b>ACT</b> <i>Associations Incorporation Act 1991</i> <i>Cooperatives Act 2002</i>	Office of Regulatory Services
<b>Northern Territory</b> <i>Associations Act</i> <i>Cooperatives Act</i>	Department of Business

# THE PROBLEM

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## REGULATORY DUPLICATION FROM MULTIPLE LEVELS OF GOVERNMENT

- 16.** The introduction of the ACNC will introduce new requirements for charities that wish to access Commonwealth tax concessions or satisfy other Commonwealth requirements, particularly charities that have not previously been subject to statutory governance standards or reporting requirements at Commonwealth or State or Territory level, such as unincorporated associations.<sup>30</sup> This RIA focuses on regulatory duplication, encompassing circumstances where Commonwealth and State or Territory regulations impose duplicated (including identical) requirements for governance and reporting for charities.
- 17.** Regulatory duplication has the potential to impose compliance costs on charities. This RIA seeks to identify and quantify those costs, with a view to determining whether government action is warranted to address regulatory duplication and seeks to develop options that would reduce avoidable costs of duplication.
- 18.** Regulatory duplication may arise from the introduction of the ACNC governance and reporting regulations for charities:
- (i) Where the Commonwealth and States or Territories require **different** governance standards. This will require charities to bear additional compliance burdens to ensure that both sets of requirements are satisfied;
  - (ii) Where the Commonwealth and States or Territories require **the same** governance standards this will also give rise to duplication but no additional compliance burden as no action will be required;
  - (iii) Where the Commonwealth and States or Territories have **different** reporting requirements. This will require charities to bear additional compliance burdens to ensure that both sets of requirements are satisfied, such as preparing additional reports or satisfying additional requirements relating to auditing of the report;
  - (iv) Where the Commonwealth and States or Territories have **the same** reporting requirements this will give rise to duplication. This will also lead to additional

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<sup>30</sup> The Treasury Consultations dealing with the introduction of new governance standards and reporting requirements is discussed at p 3.

compliance burden (although minimal) as charities will have to lodge two sets of reports.

**19.** This RIA considers:

- areas in which the ACNC requirements may duplicate State and Territory requirements; and
- the number of entities in each jurisdiction that may be impacted by the duplication.

**20.** The main areas of duplication that create additional compliance burdens for charities are:

- the requirement to take reasonable steps to ensure that its 'responsible entities'<sup>31</sup> are subject to, and comply with, the a range of duties (see the discussion of draft governance standard 6 on page 31). The proposed duties are substantially the same as the duties of directors under the *Corporations Act 2001*. Draft governance standard 6 would require charities to take steps, such as referring to the duties in a letter of appointment, board charter, codes of conduct or governing rules;
- requirements for audits of financial reports where States and/or Territories currently do not require audits, or require only reviews (see page 41). This would involve additional costs for charities by way of fees paid to auditors, or increased fees for an audit instead of a review of its financial records.

**21.** This assessment does not consider regulation that arises as a result of fundraising or gaming legislation; contractual arrangements for the delivery of services; eligibility for State or Territory tax concessions or local government requirements.

**22.** This assessment does not deal with requirements relating to incorporation of charities. State and Territory legislation provides a mechanism to enable incorporation (for incorporated associations and cooperatives with a charitable purpose) and this will remain with the States and Territories. Similarly, ASIC will retain power to incorporate entities that have a charitable purpose at the Commonwealth level.

**23.** This RIA will support work by COAG to minimise regulatory compliance costs on the not-for-profit sector. A final report to COAG, to be based on this RIA will reach a

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<sup>31</sup> A 'responsible entity' is defined in section 205-30 of the ACNC Act as an individual (or in some limited cases a corporation) who is responsible for running a charity, who is a member of the governing body (including directors or committee members) or trustees (including insolvency trustees and administrators).

conclusion about whether government action is warranted to address regulatory duplication and set out options that would reduce or eliminate compliance burdens associated with regulatory duplication. Completion of a final report to COAG before the Commonwealth makes regulations imposing Commonwealth governance standards and reporting requirements, will allow those regulations to take into account the outcomes of consultation on this RIA.



## EXTENT OF DUPLICATION

### Geographical distribution of Commonwealth-endorsed charities in Australia

24. The impact on charities will also depend on how many charities are subject to each of the State or Territory requirements. According to the ACNC<sup>32</sup> the distribution of charities that were endorsed to access Commonwealth tax concessions as at 10 December 2012 was as follows:

State	% of charities
NSW	34%
VIC	24%
QLD	18%
WA	10%
SA	8%
TAS	3%
ACT	2%
NT	1%

### Proposed ACNC governance and reporting standards

25. The ACNC Act (Division 45) and proposed Regulations establish a broad governance framework for registered charities and set specific requirements.<sup>33</sup> The States and Territories also have legislative requirements that apply to charities that take a particular form. Consequently, charities may have additional compliance burdens as a result of having to comply with different governance standards. The cost of duplication depends on the number of entities in each jurisdiction that must comply with multiple requirements.<sup>34</sup>

26. Duplication will not necessarily result in increased regulatory burden. Unless the duplication is inconsistent or in conflict, the duplication itself may not impose additional compliance requirements in some cases. Stakeholders should identify

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<sup>32</sup> See

[http://www.acnc.gov.au/ACNC/About\\_ACNC/NFP\\_reforms/Background\\_NFP/ACNC/Edu/NFP\\_background.aspx?hkey=e88db8f0-3e48-4408-ab99-c2acb6ef8a1d](http://www.acnc.gov.au/ACNC/About_ACNC/NFP_reforms/Background_NFP/ACNC/Edu/NFP_background.aspx?hkey=e88db8f0-3e48-4408-ab99-c2acb6ef8a1d)

<sup>33</sup> At the time of preparing this RIA there were no regulations in force. However, a consultation paper was released in December 2012: see p 3 for details of how to access the consultation paper.

<sup>34</sup> This is considered in the Impact Analysis section of this RIA.

where duplication imposes additional burden and the practical implications of compliance.

27. The ACNC Act imposes:

- **governance standards**, that is, the practices and procedures that must be in place to ensure that a charity operates to achieve its objectives in an effective and transparent manner; and
- **reporting requirements**, that is, the requirement for charities to provide information on an annual basis to the ACNC. All registered charities must lodge an Annual information Statement (AIS) but only 'medium' and 'large' entities (as defined) must lodge an Annual Financial Statement (AFS). The ACNC does not charge fees for registration or for lodgement of documents.

28. For this assessment, the regulatory requirements under the ACNC Act are compared to the regulatory requirements in each State and Territory for each entity type, to assess regulatory duplication.

## POTENTIAL DUPLICATION OF GOVERNANCE REQUIREMENTS

29. The proposed Regulations under the ACNC Act include six standards.<sup>35</sup> Broadly the standards deal with:

- Purposes and not-for-profit nature of a registered entity (Draft governance standard 1);
- Accountability to members (Draft governance standard 2);
- Compliance with Australian law (Draft governance standard 3);
- Responsible management of financial affairs (Draft governance standard 4);
- Suitability of responsible entities (Draft governance standard 5); and
- Duties of responsible entities (Draft governance standard 6).

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<sup>35</sup> At the time of preparing this RIA there were no regulations in force. However, a consultation paper was released in December 2012: see p 3 for details of how to access the consultation paper.

## DRAFT GOVERNANCE STANDARD 1 - PURPOSES AND NOT-FOR-PROFIT NATURE OF A REGISTERED ENTITY

### Purposes and not-for-profit nature of a registered entity

A registered entity must:

- (a) be able to demonstrate, by reference to the governing rules of the entity or by other means, its purposes and its character as a not-for-profit entity; and
- (b) make information about its purposes available to the public, including members, donors, employees, volunteers and benefit recipients; and
- (c) comply with its purposes and its character as a not-for-profit entity.

*Note* Information in relation to the purposes of a registered entity would be available to the public if it appears on the Australian Charities and Not-for-profits Register, in an Australian law on [www.com.law.gov.au](http://www.com.law.gov.au) or [www.austlii.edu.au](http://www.austlii.edu.au) or is otherwise made available on request.

**30.** The definition of “not-for-profit” for the purposes of Standard 1 has been assumed to be the definition which is in a Bill to amend the *Income Tax Assessment Act 1997* (ITAA 1997).<sup>36</sup>

***not-for-profit entity*** means an entity that:

- (a) is not carried on for the profit or gain of its owners or members, neither while it is operating nor upon winding up; and
- (b) under an \*Australian law, \*foreign law, or the entity’s governing rules, is prohibited from distributing, and does not distribute, its profits or assets to its owners or members (whether in money, property or other benefits), neither while it is operating nor upon winding up, unless the distribution:
  - (i) is made to another not-for-profit entity with a similar purpose; or
  - (ii) is genuine compensation for services provided to, or reasonable expenses incurred on behalf of, the entity.

**\*Australian law** means a Commonwealth law, a State law or a Territory law.

**\*foreign law** means a law of a foreign country.

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<sup>36</sup> Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012.

### Impact of this standard on charities

- 31. Incorporated associations, cooperatives and trusts** – Some jurisdictions explicitly require charities (or bodies or funds with a charitable purpose) to be not-for-profit and to demonstrate and comply with its purposes, while for others these requirements are implicit. There will be duplication but no action will be required and so no additional compliance burden.
- 32. Unincorporated associations and other bodies** – these charities are not subject to State and Territory legislation, so there is no duplication for these types of charities.
- 33.** Further information is at Appendix A.

#### Consultation question 1:

- A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 1, the *not-for-profit nature and purposes of a registered entity* that have not been identified above?
- B. Are there other impacts or unintended consequences that have not been identified?

### DRAFT GOVERNANCE STANDARD 2 – ACCOUNTABILITY TO MEMBERS

#### Accountability to members

A registered entity that has members must take reasonable steps to ensure that:

- (a) the registered entity is accountable to its members; and
- (b) the registered entity's members have an adequate opportunity to raise concerns about the governance of the registered entity.

*Note 1* The steps that a registered entity may take to ensure it is accountable to its members include holding annual general meetings, providing members with an annual report (including financial information and achievements towards its purpose) and providing for elections for its responsible entities.

*Note 2* The steps that a registered entity may take to ensure its members have an adequate opportunity to raise concerns include holding an annual general meeting with a question and answer session and providing an opportunity for members to propose resolutions and to vote upon those resolutions.

### Impact of this standard on charities

- 34. Incorporated associations and cooperatives** – this standard will give rise to duplication but no action is required, so no compliance burden. Existing State and Territory requirements for holding an Annual General Meeting (AGM) will satisfy the

requirements of this standard. Note 2 indicates that the provision of a question and answer session will be sufficient to satisfy the requirement relating to members being able to raise concerns. Charities that do not already do so will be able to meet this requirement without incurring costs.

**35. Charitable trusts** – this standard does not apply as charitable trusts do not have members.

**36. Unincorporated associations and other bodies** – these charities are not subject to State and Territory legislation, so there is no duplication for these charities.

**37.** Further information is at Appendix B.

**Consultation question 2:**

- A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 2, *Accountability to members* that have not been identified above?
- B. Are there other impacts or unintended consequences that have not been identified?

**DRAFT GOVERNANCE STANDARD 3 – COMPLIANCE WITH AUSTRALIAN LAW**

**Compliance with Australian Law**

A registered entity must not engage in conduct, or omit to engage in conduct, that may be dealt with:

- (a) as an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or
- (b) by way of a civil penalty of 60 penalty units or more.

*Note 1* See section 4AA of the Crimes Act 1914 for the current value of a penalty unit.

**Impact of this standard on charities**

**38. All entity types** – the requirement for the charity not to engage in illegal activity of a serious kind will not give rise to a compliance burden.

**39.** Further information is at Appendix C.

**Consultation question 3:**

- A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 3, *Compliance with Australia law* that have not been identified above?
- B. Are there other impacts or unintended consequences that have not been identified?

**DRAFT GOVERNANCE STANDARD 4 - RESPONSIBLE MANAGEMENT OF FINANCIAL AFFAIRS**

**Responsible management of financial affairs**

A registered entity must take reasonable steps to manage its financial affairs in a responsible manner.

**Impact of this standard on charities**

- 40. Incorporated associations and cooperatives** – there is no exact equivalent in State or Territory legislation for incorporated associations and cooperatives that have charitable purposes. Some States and Territories require maintenance of records and lodgement of financial reports. There will be additional compliance burden for entities that are not 'managing their affairs in a responsible manner'.
- 41. Charitable trusts** – there are existing State and Territory requirements to exercise prudence in relation to investment of trust funds. There is also a duty at common law for a trustee to manage financial resources of a trust in a responsible manner so there will not be any additional compliance burden.
- 42. Unincorporated associations and other bodies** – these charities are not subject to State and Territory legislation, so there is no duplication for these charities.
- 43.** Further information is at Appendix D.

**Consultation question 4:**

- A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 4, *Responsible Management of Financial Affairs* that have not been identified above?
- B. Are there other impacts or unintended consequences that have not been identified?

## DRAFT GOVERNANCE STANDARD 5 - SUITABILITY OF RESPONSIBLE ENTITIES

### Suitability of responsible entities

(2) A registered entity must:

- (a) take reasonable steps to ensure that each of its responsible entities meet the conditions mentioned in subsection (3); and
- (b) after taking those steps:
  - (i) be, and remain, satisfied that each responsible entity meets the conditions; or
  - (ii) if it is unable to be, or remain, satisfied that a responsible entity meets the conditions, take reasonable steps to remove that entity.

*Note* Other Australian laws may require responsible entities to be replaced, if removed, because a registered entity may need to have a minimum number of responsible entities.

#### *Examples of reasonable steps*

Reasonable steps may include obtaining declarations from responsible entities and the searching of public registers.

(3) Subject to subsection (5), the conditions for each responsible entity are that it is not:

- (a) disqualified from managing a corporation, within the meaning of the Corporations Act 2001; or
- (b) disqualified by the Commissioner, at any time during the preceding 12 months, from being a responsible entity of a registered entity under subsection (4).

*Note* Other Australian laws may place other limitations on who may be the responsible entity of a registered entity, or a particular type of registered entity.

(4) The Commissioner may disqualify an entity from being eligible to be a responsible entity for the purpose of this standard if:

- (a) the entity has been previously suspended or removed as a responsible entity of any registered entity, under Division 100 of the Act; and
- (b) the entity has been given notice of its disqualification by the Commissioner; and
- (c) the Commissioner reasonably believes that the disqualification is justified having regard to the objects of the Act.

(5) Despite subsection (3), the Commissioner may allow an individual to be a responsible entity for a particular registered entity if the Commissioner believes it is reasonable to do so in the circumstances.

(6) An entity that is dissatisfied with a decision of the Commissioner to disqualify the entity under subsection (4) may object to the decision in the manner set out in Part 7-2 of the Act.

#### **Impact of this standard on charities**

- 44. Incorporated associations** – State and Territory legislation has requirements relating to eligibility of officers that are similar to the conditions referred to in the standard. The Standard also requires the charity to 'take reasonable steps to remain satisfied' that the officer meets the conditions. According to the Standard, this can be satisfied by obtaining a declaration from the officer and searching public registers, so will not require much additional compliance burden.
- 45. Cooperatives** – existing State and Territory legislation have almost identical qualification criteria for officers of a cooperative. Although there is duplication there is no additional compliance burden.
- 46. Charitable trusts** – there is no State and Territory legislation for qualification or disqualification of trustees, so this standard does not lead to duplication.
- 47. Unincorporated associations and other bodies** – these charities are not subject to State and Territory legislation, so there is no duplication for these charities.
- 48.** Further information is at Appendix E.

#### **Consultation question 5:**

- A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 5, *Suitability of Responsible Entities* that have not been identified above?
- B. Are there other impacts or unintended consequences that have not been identified?



## DRAFT GOVERNANCE STANDARD 6 – DUTIES OF RESPONSIBLE ENTITIES

(2) A registered entity must take reasonable steps to ensure that its responsible entities are subject to,<sup>37</sup> and comply with, the following duties:

- (a) to exercise the responsible entity's powers and discharge the responsible entity's duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible entity of the registered entity;
- (b) to act in good faith in the best interests of the registered entity, to further the purposes of the registered entity;
- (c) not to misuse the responsible entity's position;
- (d) not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity;
- (e) to disclose perceived or actual material conflicts of interest of the responsible entity:
- (f) not to allow the registered entity to operate while insolvent.

*Note 1* This standard sets out some of the more significant duties of responsible entities. Other duties are imposed by other Australian laws, including the principles and rules of the common law and equity.

*Note 2* Some of the duties imposed by other Australian laws may require a responsible entity to exercise its powers and discharge its duties to a higher standard.

*Note 3* For paragraph (2) (e), a perceived or actual material conflict of interest that must be disclosed includes a related party transaction.

(3) For paragraph (2) (e), a perceived or actual material conflict of interest must be disclosed:

- (a) if the responsible entity is a director of the registered entity—to the other directors (if any); or
- (b) if the registered entity is a trust, and the responsible entity is a director of a trustee of the registered entity—to the other directors (if any); or
- (c) if the registered entity is a company—to the members of the registered entity; or

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<sup>37</sup> The following discussion is on the basis that the words 'subject to' do not require the charity to enter into a legally enforceable agreement with each responsible entity. The analysis is on the basis that the words 'subject to' merely requires an arrangement such as a board charter or code of conduct. For further information about draft governance standard 6, see the separate consultation paper on the draft governance standards.

(d) in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form.

*Note 1* **Company** is defined in section 205-10 of the Act, to include a body corporate or any unincorporated association or body of persons (but not a partnership).

*Note 2* Paragraph (c) applies in situations where paragraph (a) cannot apply, for example, if there is only one director or all the directors have a similar conflict.

*Note 3* Part 7-6 of the Act provides for the approval of forms.

(4) If the responsible entity's conduct is consistent with Subdivision 45-C, the responsible entity is taken to have complied with the duties mentioned in subsection (2).

(5) In this section:

**insolvent** has the meaning given by subsection 95A (2) of the *Corporations Act 2001*.

## Draft protections under governance standard 6

### 45.100 Reasonable steps taken to ensure compliance with duties

If a responsible entity meets a protection mentioned in this Subdivision, the registered entity is taken to have taken all reasonable steps to ensure that its responsible entities have complied with the duties set out in section 45.30.

#### 45.105 Protection 1

(1) A responsible entity meets this protection if the responsible entity, in the exercise of the responsible entity's duties, relies, on information, including professional or expert advice, in good faith, and after the responsible entity has made an independent assessment of the information, if that information has been given by:

- (a) an employee of the registered entity that the responsible entity believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
- (b) a professional adviser or expert in relation to matters that the responsible entity believes on reasonable grounds to be within the individual's professional or expert competence; or
- (c) another responsible entity in relation to matters within their authority or area of responsibility; or
- (d) an authorised committee of responsible entities that does not include the responsible entity.

(2) In determining whether the responsible entity has made an independent assessment of the information or advice, regard must be had to the responsible entity's knowledge of the registered entity and the complexity of the structure and operations of the registered entity.

## **Protection 2**

(1) A responsible entity meets this protection if the responsible entity makes a decision in relation to the registered entity, and the responsible entity meets all of the following:

- (a) the responsible entity makes the decision in good faith for a proper purpose; and
- (b) the responsible entity does not have a material personal interest in the subject matter of the decision; and
- (c) the responsible entity informs itself about the subject matter of the decision, to the extent the entity reasonably believes to be appropriate; and
- (d) the responsible entity rationally believes that the decision is in the best interests of the registered entity.

(2) In this section:

**decision** means any decision to take, or not take, action in relation to a matter relevant to the operations of the registered entity.

## **45.115 Protection 3**

(1) A responsible entity meets this protection if any of the following are satisfied:

- (a) at the time when the debt was incurred, the responsible entity had reasonable grounds to expect, and did expect, that the registered entity was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time; or
- (b) the responsible entity took all reasonable steps to prevent the registered entity from incurring the debt.

*Note* This protection relates to the duty mentioned in paragraph 45.30(2)(f).

## **45.120 Protection 4**

(1) This section is satisfied if, because of illness or for some other good reason, a responsible entity could not take part in the management of the registered entity at the relevant time.

## **Impact of this standard (and protections) on charities**

**49. Incorporated associations** – although there is no exact equivalent most States and Territories have requirements relating to misuse of position or information and some have provisions relating to avoiding insolvent trading. Only Victoria has legislation that requires officers to act in good faith and exercise care, skill and diligence.<sup>38</sup> The differences in the requirements in some State and Territory

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<sup>38</sup> Vic, Part 6, Division 3.

legislation may lead additional compliance costs. The protections (which essentially provide defences) require the officer 'to take reasonable steps' and 'to have reasonable grounds' and this may reduce the burden of the standard. The charity will need to take 'reasonable steps, to ensure the responsible entity is subject to the duties but it is assumed that this can be satisfied by a board charter or code of conduct.<sup>39</sup>

**50. Cooperatives** – the State and Territory legislation imposes duties that are broadly similar to duties imposed under this standard. The protections (which essentially provide defences) require the officer 'to take reasonable steps' and 'to have reasonable grounds' and this may reduce the burden of the standard. There are differences in some jurisdictions relating to contracts entered into by directors but these are more likely to apply to for-profit cooperatives. Cooperatives will need to take 'reasonable steps, to ensure the responsible entity is subject to the duties but it is assumed that this can be satisfied by a board charter or code of conduct.

**51. Charitable trusts, unincorporated associations and other bodies** – these charities are not subject to State and Territory legislation, so there is no duplication for these charities.

**52.** The protections, other than those mentioned above, have no impact on the regulatory burden.

**53.** Further information is at Appendix F.

**Consultation question 6:**

- A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 6, *Duties of Responsible Entities* that have not been identified above?
- B. Are there other impacts or unintended consequences that have not been identified?

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<sup>39</sup> See footnote 38.

## POTENTIAL DUPLICATION OF REPORTING REQUIREMENTS

### ACNC ACT REPORTING REQUIREMENTS

**54.** Under the ACNC Act, entities that become registered must report to the ACNC:

- based on size: referred to as entity tiers (s 205-25);
- in annual information statements (s 60-5);
- in annual financial statements (ss 60-10 to 60-60 and ACNC Regs);
- certain other requirements including notifying the ACNC of change of particulars (s 65-5); additional reporting obligations (subdiv 60-E) and group reporting requirements (subdiv 60-G).

**55.** Consultations on the draft ACNC reporting requirements are underway with stakeholders.<sup>40</sup> The ACNC financial reporting requirements are subject to transitional arrangements that provide charities with time to change their practices to comply (see page 51 for more details about the transitional arrangements).

**56.** Reporting obligations can give rise to duplication through duplication of information required or the timing of the reporting. The cost of this duplication varies depending on the amount of time required by the entity to comply; any costs incurred in lodging documents and the need for expert (legal, accounting or auditing) assistance. The overall cost of this type of duplication varies depending on the number of entities subject to the ACNC reporting obligations. According to ATO data (as at 24 June 2012): 'small entities' account for 78% of charities entitled to tax concessions; 'medium entities' account for 11% of charities entitled to tax concessions; and 'large entities' account for 11% of charities entitled to tax concessions.

### ENTITY TIERS

**57.** The ACNC Act aims to require proportional reporting, so the level of reporting detail required is based on size. Under the ACNC Act, size is measured by annual revenue to produce three tiers:

- Small < \$250,000 annual revenue;
- Medium > \$250,000 but < \$1,000,000 annual revenue; and

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<sup>40</sup> For details of the Treasury Consultation on Reporting requirements, see p 3.

- Large > \$1,000,000 annual revenue.
58. All registered charities will have to submit an Annual Information Statement (AIS)<sup>41</sup> to the ACNC. The AIS covers purposes and activities, reporting obligations to other government agencies, and operational resources.
  59. Small entities will not have to submit financial statements to the ACNC. Medium and large entities will have to lodge an Annual Financial Statement (AFS); medium entities can have their financial statements reviewed or audited; large entities must have their financial statements audited.
  60. The States and Territories also have reporting obligations for incorporated associations and cooperatives, but not for charitable trusts, unincorporated associations or other bodies.
  61. The ACNC imposes minimal financial reporting obligation on small entities (ie those with revenue less than \$250,000). Small entities will not have to submit financial statements to the ACNC. However, small entities must submit an AIS. As noted above, according to the ATO, small entities comprise 78% of all charities that access tax concessions. Small entities will have some additional reporting in the AIS, but no duplication because States and Territories (other than Victoria) do not require reporting on that type of information.
  62. The reporting obligations on medium and large entities will result in some duplication where entities report to both their State or Territory regulator and the ACNC. All medium and large entities have additional reporting obligations in the form of the AIS. In addition, some medium and large entities, such as unincorporated associations, charitable trusts and WA incorporated associations, now have financial reporting obligations to the ACNC, where previously they had no requirement to report to a government authority based on entity type.
  63. The different cut-off points for tiered reporting between the ACNC and the various State and Territory levels will require charities to establish and monitor their positions in relation to both jurisdictions.

#### **Impact of entity tiers reporting on charities**

64. **Incorporated associations** – this requirement will require charities to assess their eligibility and report accordingly. Charities that currently report to State or Territory regulators will have duplication. This is discussed below.

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<sup>41</sup> Under transitional arrangements a modified form of AIS is required for the 2012-13 income year.

**65. Cooperatives** – this requirement will require charities to assess their eligibility and report accordingly. Cooperatives with annual revenue of more than \$250,000 face some duplication of reporting.

**66. Unincorporated associations, charitable trusts and other bodies** – there is no State and Territory legislation for reporting by these entities, so there is no duplication for these types of charities.

**67.** Further information is at Appendix G.

**Consultation question 7:**

- A. Are there other duplicative requirements that have not been identified between the reporting tiers in state and territory legislation and the reporting tiers in the ACNC Act ?
- B. Are there other impacts or unintended consequences that have not been identified?

## **ANNUAL INFORMATION STATEMENTS**

**68.** All registered entities must submit an Annual Information Statement (AIS)<sup>42</sup> for the financial year in the approved form to the ACNC Commissioner (s 60-5). The ACNC Commissioner may approve different forms for different entities, for example, according to size. The registered entity must give the AIS to the ACNC Commissioner no later than 31 December in the following financial year (ie within 6 months of the end of the standard financial year).<sup>43</sup> Failure to do so may result in an administrative penalty.

**69.** The ACNC Commissioner has approved a draft transitional AIS for 2012-13. The draft AIS form requires information about:

- A. The charity's details:
  - Name
  - ABN
  - postal and email address
  - Financial year

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<sup>42</sup> Section 40-10 provides that the Commissioner may withhold or remove information from the ACN Register.

<sup>43</sup> Unless a substituted period is approved by the Commissioner or subject to transitional provisions.

- Size
- Purposes
- Qualification as a basic religious charity
- Group status
- B. Activities and beneficiaries:
  - Activities in financial year
  - How charitable purposes were pursued
  - Any planned changes to the way charitable purposes pursued
  - Who was helped by the charity's activities
- C. Resources and operating locations:
  - Details of employees and volunteers (headcount)
  - Number of volunteer hours
  - Charity's activities in States or Territories
  - Charity's activities outside Australia
- D. Reporting and regulatory obligations (all of the questions in this section are optional):
  - Details of reporting obligations to Australian government entities
  - Reporting obligations to State or Territory governments
  - Time spent completing reporting obligations.

**70.** For the first non-transitional year (2013-14), small entities will also have to provide some basic financial information (Section D of the draft transitional AIS).<sup>44</sup>

### **Impact of annual information statement reporting on charities**

**71. Incorporated associations** – the AIS is an additional reporting requirement so will not result in duplication. To the extent that some States require non-financial

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<sup>44</sup> The information to be required from small entities will be the subject of further consultation by the ACNC as it develops the AIS that will apply from 2013-14.



information there will be some duplication and some minor compliance burden (see App H).

**72. Cooperatives** – the AIS is an additional reporting requirement, so will not result in duplication. To the extent that some States require non-financial information there will be some duplication and some minor compliance burden (see App H).

**73. Unincorporated associations, charitable trusts and other bodies** – there is no State and Territory legislation for reporting by these entities, so there is no duplication for these types of charities.

**74.** Further information is at Appendix H.

**Consultation question 8:**

- A. Are there other duplicative requirements between state and territory legislation, and the Annual Information Statement reporting requirements that have not been identified above?
- B. Are there other impacts or unintended consequences that have not been identified?

**ANNUAL FINANCIAL STATEMENT**

**75.** The ACNC Act requires medium and large entities to submit an Annual Financial Statement (AFS).<sup>45</sup> Small entities do not need to submit an AFS. The registered entity must report to the Commissioner no later than 31 December the following financial year<sup>46</sup> or a later time that the Commissioner allows.

**76.** The AFS must contain:

- financial statements for the registered entity, prepared according to accounting standards (some parts of AASB 101 do not apply);<sup>47</sup>
- notes required by the accounting standards and any other information necessary to give a ‘true and fair view’ of the financial position and performance of the registered entity; and
- a signed declaration from the authorised responsible entities that in their opinion:
  - (a) they believe there are reasonable grounds that the registered entity can pay all of its debts, as and when they become due and payable; and

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<sup>45</sup> Basic religious entities are not required to submit an AFS: s 60-60 ACNC Act.

<sup>46</sup> Unless a substituted period is approved by the Commissioner.

<sup>47</sup> Only in respect of the first reporting year.

(b) the financial statements and notes satisfy the requirements of the Act.

#### **Audit or Review**

**77.** Medium entities must have their AFS reviewed or audited. Large entities must have their AFS audited. The person carrying out the review or audit must be:

- a registered company auditor; or
- a firm appointed as auditor, at least one member of which is a registered company auditor who is ordinarily resident in Australia; or
- an authorised audit company (within the meaning of the *Corporations Act*); or
- an entity prescribed by the regulations.

**78.** For audits, the auditor must determine whether the financial report satisfies the requirements of Div 60 of the ACNC Act; whether the auditor has all the information, explanation and assistance needed to conduct the audit; whether the registered entity has kept financial records sufficient to enable a financial report to be prepared and audited; and whether the registered entity has kept other required records.

**79.** For reviews, the reviewer must determine the last three matters and conclude whether, on the basis of the review, anything causes the reviewer to believe that the financial report does not satisfy the requirements of Div 60 of the ACNC Act.

**80.** An audit or review must be undertaken in accordance with the relevant Auditing Standards.

**81.** A registered entity must obtain from its auditor or reviewer a written declaration that, to the best of the auditor's or reviewer's knowledge and belief, no contraventions of any applicable code of professional conduct arise in relation to the audit or review.

**82.** The ACNC does not charge fees to lodge the AFS (or any other documents).

#### **Impact of annual financial statement reporting on charities**

**83. Incorporated associations** – some duplication in the content of the financial report and audit/review requirements occurs. This duplication only arises for medium and large charities ie with annual revenue of more than \$250,000 (around 22 per cent of charities) and will impose an additional compliance burden.

**84. Cooperatives** – some duplication in the content of the financial report and audit/review requirements occurs. This duplication only arises for medium and large charities ie with annual revenue of more than \$250,000 (around 22 per cent of charities) and will impose an additional compliance burden.

**85. Unincorporated associations, charitable trusts and other bodies** – there is no State and Territory legislation for reporting by these entities, so there is no duplication for these types of charities.

**86.** Further information is at Appendix I.

**Consultation question 9:**

- A. Are there other duplicative requirements between state and territory legislation, and the Annual Financial Statement reporting requirements that have not been identified above?
- B. Are there other impacts or unintended consequences that have not been identified?

**OTHER REPORTING REQUIREMENTS**

**87.** The ACNC Act requires registered charities to notify the Commissioner, in the approved form, if any of the following occur:

- a) change of name;
- b) change of address for service;
- c) an entity has ceased to be, or has become, a responsible entity of the registered entity;
- d) change of governing rules;
- (e) there has been a significant contravention or non-compliance with the ACNC Act, so as to disentitle the charity from registration.<sup>48</sup>

**88.** The ACNC does not charge to lodge forms.

**Impact of notifying change of particulars**

**89. Incorporated associations** – some duplication, and additional compliance burden, arises from the requirement to lodge changes of particulars with both the ACNC and the relevant State or Territory authority.

**90. Cooperatives** – some duplication arises from the requirement to lodge changes of particulars with both the ACNC and the relevant State or Territory authority.

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<sup>48</sup> ACNC Act s 65-5, the circumstances are listed in sub-sec (2).

**91. Unincorporated associations, charitable trusts and other bodies** – there is no State and Territory legislation for reporting by these entities, so there is no duplication for these types of charities.

**92.** Further information is at Appendix J.

**Consultation question 10:**

- A. Are there other duplicative requirements between state and territory legislation, and the requirement to notify the ACNC of change of particulars that have not been identified above?
- B. Are there other impacts or unintended consequences that have not been identified?

**Impact of additional reporting requirements**

**93.** The ACNC Act provides for the Commissioner to require additional reporting by particular charities or by particular categories of charities. This is likely to be relevant only where there is reason to believe that a registered entity has contravened the ACNC Act.

**94. Incorporated associations** – Some States and Territories have provisions in the Incorporated Associations legislation requiring additional information<sup>49</sup> but as noted this is not likely to be used frequently and so imposes a minor compliance burden.

**95. Cooperatives** -There is power for the Registrar of Cooperatives under current and proposed law to require additional reporting, but as noted this is not likely to be used frequently and so imposes a minor compliance burden.

**96. Unincorporated associations, charitable trusts and other bodies** – there is no State and Territory legislation for reporting by these entities, so there is no duplication for these types of charities.

**97.** Further information is at Appendix J.

**Impact of group reporting**

**98.** The ACNC Act permits groups of entities to prepare a group financial report.

**99. Incorporated associations** – The States and Territories have no equivalent provisions in the Incorporated Associations legislation permitting group reporting.

**100. Cooperatives** – Under State and Territory legislation cooperatives can prepare a combined report for a consolidated group. The consolidated group is

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<sup>49</sup> NSW s 51, Vic s 93(1)(b), QLD s 119A, NT s 94.

defined in the *Corporations Act 2001*: members of the group must be wholly owned by a head/parent company. This arrangement is more likely to occur with distributing cooperatives. If groups of cooperatives are charities, some duplication occurs but the arrangement is concessional and will not add to the burden of reporting.

**101. Unincorporated associations, charitable trusts and other bodies** – there is no State and Territory legislation for reporting by these entities, so there is no duplication for these types of charities.

**102.** Further information is at Appendix J.

# OBJECTIVES OF GOVERNMENT ACTION

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- 103.** Governance and reporting requirements applicable to charities are intended to maintain and protect public trust and confidence in the Australian charitable sector.
- 104.** In light of the proposed ACNC governance and financial reporting regulations, COAG reconfirmed in July 2012 the objective of minimising regulatory compliance costs to the NFP sector. Accordingly, COAG agreed to consider, before the end of 2012, the results of a jurisdiction and sector-specific regulatory impact assessment of both existing and new governance and reporting standards in the NFP sector, and options to achieve the most effective regulatory outcome for NFPs.
- 105.** The objective of government action in the potential reform options assessed in this RIA is to reduce or avoid regulatory duplication between existing governance and reporting requirements of the States and Territories and proposed requirements in ACNC legislation, ensuring that regulation for the sound governance and financial accountability of charities is effective and proportional, taking into account the type, size, and geographical scope of charities involved.

# OPTIONS THAT MAY ACHIEVE OBJECTIVES

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- 106.** The mapping of the ACNC requirements against the pre-existing State and Territory requirements indicates that there is and will continue to be some duplication and that this will impose additional compliance costs.
- 107.** The Not-for-profit Reform Working Group (NRWG) established by COAG has set a number of options to be considered by the RIA. There is no preferred option and the final report to COAG will set out a menu of options for the consideration of individual jurisdictions. The options set by the NRWG are:

## OPTION 1: RETAIN EXISTING ARRANGEMENTS

- 108.** Under this option no action would be taken to address regulatory duplication. Each State and Territory would proceed with regulation of the NFP sector to the extent of its constitutional powers with respect to governance standards and reporting requirements. The combination of the requirements of the ACNC and the existing requirements of each State and Territory with respect to governance standards and reporting requirements will result in duplication as described above.
- 109.** Retaining existing arrangements will result in regulatory duplication in relation to the governance standards and to reporting requirements for some entities. In relation to governance standards duplication may arise under Standards 5 and 6 for incorporated associations and cooperatives that are charities. In relation to reporting, duplication may arise for incorporated associations and cooperatives. There will be less duplication for small entities (revenue less than \$250,000 per year) as they are not required to lodge an Annual Financial Report. Small entities make up 78% of all registered charities. The reporting obligations on medium (revenue > \$250,000 and < \$1m) and large entities (revenue > \$1m) will result in some duplication where those entities will have to report to both their State or Territory regulator and the ACNC.
- 110.** There will be no duplication for unincorporated associations, charitable trusts or other bodies because they are not currently subject to statutory requirements by the States or Territories.

## OPTION 2: SHARING OF REGULATORY FUNCTIONS

- 111.** Regulation (governance and reporting) under the ACNC Act could be enforced by both the ACNC and State and Territory regulators under a shared operational arrangement.
- 112.** This option assumes that the requirements of the ACNC Act could be enforced by the State and Territory regulators. One way in which this could occur would be if each State and Territory applied the governance and reporting standards as a law of their jurisdiction.
- 113.** The Australian Consumer Law (ACL) is an example of this approach. Under the ACL, a memorandum of understanding between the Commonwealth and State and Territory regulators deals with the way in which regulatory responsibilities are shared between jurisdictions. For example, the ACNC could deal with 'national' charities and 'national' issues, whereas smaller charities and local issues (ie charities that only operate within the jurisdiction) could be regulated by State and Territory regulators.
- 114.** This option could be flexible as it could relate to individual States or Territories or to individual entity types or to some or all of the requirements. For example, in relation to the governance standards, the ACNC could agree to accept the requirements imposed by some or all of the States or Territories and to have the State and Territory regulators ensure that the requirements are complied with. (This would require changes to the ACNC Act and Regulations to incorporate those requirements.)
- 115.** In relation to reporting it may be more difficult to get agreement because of the different reporting requirements, including those dealing with entity size and the consequent obligation to report. For example, if the ACNC requires an entity to lodge a financial report that complies with the AASB standards and the relevant State or Territory has some other reporting requirement, it may be difficult to achieve agreement although the requirements of the States and Territories are often less stringent. It is not clear if the regulators have power to waive their powers under the relevant legislation.<sup>50</sup> If not, this may require legislative changes. This option may result in the States and Territories regulating their own and the Commonwealth's requirements and not receiving any additional revenue. There may also be concerns in some jurisdictions about applying the laws of another jurisdiction.

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<sup>50</sup> But see Associations Incorporation Reform Act 2012 (Vic) s 103.



### **OPTION 3: CHANGES TO COMMONWEALTH LEGISLATION TO ADOPT A COMMON REGULATORY PRACTICE**

- 116.** The ACNC Act and Regulations could be amended (where necessary) to ensure that ACNC Regulations are consistent with common or most cost-effective State and Territory regulatory practice. The identification of the different regimes for incorporated associations and cooperatives and the differences between the States and Territories suggests that there is unlikely to be a 'common' regime. Direct costs to charities for lodgement of annual reports and returns under State and Territory legislation are higher than under the ACNC Act as the Commonwealth has decided to absorb these costs of regulation.
- 117.** In the absence of harmonisation of requirements across the States and Territories, this option would retain differences in requirements between jurisdictions. This could be undesirable to the extent that those differences impose regulatory burdens on charities that operate across jurisdictions. On the other hand, differences could be maintained to the extent that they do not give rise to excessive regulatory burdens on charities.
- 118.** This option assumes that the requirements of the ACNC relating to governance and/or reporting can be modified to bring them into line with the requirements of the States and Territories. This may be possible in relation to particular requirements, for example, some of the governance standards, or for particular types of entities, for example, cooperatives (which have a degree of uniformity in regulation), or to particular jurisdictions, for example, Victoria (which has the same entity classification as the ACNC). However, it is difficult to identify a common practice in relation to unincorporated associations or in relation to reporting requirements. It may also be difficult to identify a more cost-effective regime for the ACNC to adopt as the cost estimates would need to consider the different approach to fees between the States and Territories and the ACNC.
- 119.** An alternative under this option might be for the ACNC to adopt or modify rules that have features of the regulatory regimes of the States and Territories. For example, if the governance rules proposed for the ACNC are more onerous than those adopted by the (majority of) States and Territories in relation to, for example, incorporated associations, the ACNC requirements could be modified.

### **OPTION 4: CHANGES TO STATES' AND TERRITORIES' LEGISLATION TO REDUCE DUPLICATION**

#### **OPTION 4A: HARMONISING CHARITIES' COMPLIANCE BURDEN**

- 120.** This option proposes that States and Territories would introduce amending legislation individually to ensure regulatory duplication is minimised or avoided.

**121.** This option would require all or some of the States and Territories to amend their legislation relating to incorporated associations, cooperatives and charitable trusts as necessary so that the requirements of the relevant legislation as to governance and/or reporting are the same as those of the ACNC. An example of this option is that South Australia has announced that it will make amendments to its incorporated associations' legislation to harmonise reporting requirements for incorporated associations which register as charities with the ACNC.<sup>51</sup>

#### **OPTION 4B: CARVE OUT CHARITIES**

**122.** Alternatively, each State and Territory could 'carve out' charities from their statutory regimes for incorporated associations and cooperatives. This could either be done by legislation or by administrative action, for example, an incorporated association that is a registered charity could be excluded from the incorporated associations' requirements by legislative amendment or Class Order (South Australia has provisions that allow amendment by Class Order). An example of such a carve-out could be the carve-out from the Australian Prudential Regulatory Authority's (APRA) prudential requirements for building societies etc.

**123.** Another way of achieving a similar outcome might be for States and Territories to enter into an agreement with the Commonwealth to accept that if the requirements of the ACNC in relation to governance and/or reporting are satisfied, the equivalent provision in the State or Territory legislation will be satisfied. This is likely to require some change to the relevant State and Territory legislation but it may be possible to do it by way of an intergovernmental agreement. This option might also utilise the experience of the State and Territory regulators so that they collect the information required by the ACNC and to use it for the purpose of satisfying both sets of requirements. This could be done by modifying the forms currently used by the States and Territories to bring the information requirements into line with those of the ACNC, especially in relation to financial reporting. Another possibility might be for the State and Territory regulators to accept a modified form of reporting from charities, for example, charities could provide their Australian Business Number (ABN) and the State or Territory regulator could have access to the financial reports lodged with the ACNC with respect to those entities.

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<sup>51</sup> See joint media release of the Assistant Treasurer, the Minister for Social Inclusion and the Deputy Premier of South Australia, 'Government Delivering Real Reductions in Red Tape for Charities', 11 October 2012, <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/116.htm&pageID=003&min=djba&Year=&DocType=0>

## OPTION 5: REFERRAL OF POWER TO REGULATE CHARITIES BY STATES AND TERRITORIES TO THE COMMONWEALTH

- 124.** Following consultation, a State or Territory could refer powers to the Commonwealth to regulate entities that are charities. The referral could be a full or partial referral (under an inter-governmental agreement) within their jurisdiction. This would remove any duplication (subject to the terms of the agreement).
- 125.** An example of such a referral is in relation to the corporations legislation (*Corporations Act 2001*). There were some carve-outs under that referral including that the States and Territories retained power over incorporated associations and cooperatives. It would therefore be important to identify clearly the nature of the referral and the extent of power remaining with the States and Territories.
- 126.** This option would require negotiation on the terms necessary to get the agreement of the Commonwealth and all the States and Territories and to determine the limits of the referral (for example, whether the referral relates to all charities, or only incorporated associations or cooperatives that are charities). The States and Territories may wish to retain some powers, for example, to incorporate incorporated associations and cooperatives, and to retain supervision of trusts (including supervision by the Supreme Courts).

Consultation questions:
11. Are there other feasible options to address regulatory duplication that have not been identified? If you identify other feasible options, please describe the option and highlight the key advantages and disadvantages.
12. For each option, are there other advantages and disadvantages that you think jurisdictions should consider?
13. Which option do you consider that jurisdictions should pursue? Why do you prefer this option?
14. Do you have any other suggestions on how to minimise costs arising from regulatory duplication?
15. If jurisdictions decide to pursue an option other than the status quo, do you have any suggestions on how to manage the cost of transition?

# IMPACT ANALYSIS

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## TRANSITIONAL ARRANGEMENTS FOR COMMONWEALTH REPORTING AND GOVERNANCE STANDARDS

- 127.** The Commonwealth has aimed to minimise regulatory duplication and provide a smooth transition to the new ACNC framework. In particular, the proposed reporting regulations will be subject to transitional arrangements whereby the ACNC would not require separate reporting if an entity has reported to another regulator up to and including the 2014-15 financial year. Similarly, transitional arrangements will provide for a period of 18 months to allow entities to alter internal governance arrangements and 4 years to make changes (if any are required) to governing rules.
- 128.** Accordingly, the analysis of the burden of regulatory duplication under Option 1 (below) is made without taking into account that the Commonwealth governance and reporting regulations have not yet been made and would be subject to lengthy transitional periods. Any increased regulatory burden imposed by regulatory duplication would only arise in the medium to long term if no action is taken to either address duplication or extend transitional arrangements applicable to the governance and reporting regulations.

## COST ESTIMATES

- 129.** Deloitte Access Economics (DAE) has provided indicative cost estimates of regulatory duplication and how that cost would be reduced by each of the options. These estimates are based on the following:
- ATO data on the number of charities covered by the proposed ACNC regulations;<sup>52</sup>
  - Mapping of the existing regulatory requirements of the States and Territories against the proposed regulatory requirements of the ACNC; and
  - Commentary on the identified regulatory burden and duplication.
- 130.** In calculating the marginal burden of the regulatory duplication DAE relied on a number of information sources:

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<sup>52</sup> See attachment where DAE notes that some States and Territories expressed concern about the accuracy of the ATO data.

- Charity time (administrative and operational, including administrative staff time but not Board members time) based on brief consultations with a number of NFP organisations, Professor Myles McGregor-Lowndes (QUT) and Ann O’Connell (Melbourne Law School) (University Consultants) and DAE staff;
- Regulator fees based on publicly available State and Territory fee requirements;
- Legal and accounting services (including auditing services) based on consultations with practitioners from a number of States and Territories.

**131.** DAE has assessed the compliance costs of regulatory duplication across the 12 ACNC requirements, 8 State and Territories and 5 entity types and estimated the directional cost of the marginal burden. This marginal cost is summarised in the table below.

**132.** Apart from Victoria which has less expected duplication burden than the other States and Territories,<sup>53</sup> there do not appear to be significant cost differences between the current State and Territory requirements in areas of regulatory duplication (although the numbers of charities in each entity type and State and Territory will obviously vary and this will affect total regulatory duplication burden estimates). For this reason, the marginal cost is presented below by reference to:

- Proposed ACNC requirement ; and
- Entity type.

**133.** Burden is indicated by coloured ‘traffic lights’, with:



Red indicating greatest regulatory duplication burden (change to existing systems or multiple reporting is required for charities);



Yellow indicating where a Standard does not apply to an entity type



Green indicating no burden (no change is required)

























































**Black** indicating new and additional requirements for charities. As these requirements do not give rise to regulatory duplication between the Commonwealth

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<sup>53</sup> This is mainly due to Victoria having already started to align its regulatory framework with the *Corporations Act 2001* (for example in aligning its entity tiers, having relevant duties expressly imposed by the Associations Incorporation Reform Act 2012 etc.).

and States and Territory regulators, they have been identified but not costed. Nevertheless, it is noted that these requirements will result in additional costs for charities.

	Incorporated associations	Trusts	Unincorporated associations	Cooperatives	Other bodies
<b>Standard 1: Governing rules</b>					
<b>Standard 2: Accountability to members</b>					
<b>Standard 3: Compliance with Australian Law</b>					
<b>Standard 4: Responsible management of financial affairs</b>					
<b>Standard 5: Suitability of responsible entities</b>					
<b>Standard 6: Duties of responsible entities</b>					
<b>Entity tiers</b>					
<b>Annual Information Statement</b>					
<b>Annual Financial Statement</b>					
<b>Notifying ACNC of changes</b>					
<b>Additional reporting</b>					
<b>Group reporting</b>					

**134.** In addition, the cost estimates take into account that, based on ATO data, incorporated associations make up 39.1% of entities claiming Commonwealth tax concessions, cooperatives make up 0.7% and charitable trusts 12%. Furthermore, the duplication in relation to providing an AFS only applies to medium and large entities. According to ATO data, medium sized entities account for 11% and large sized entities account for 11% of all entities claiming Commonwealth tax concessions. This means that 78% of all entities claiming entitlement to Commonwealth tax concessions will not be subject to duplication in relation to the new AFS reporting requirements.

## **OPTION 1: RETAIN EXISTING ARRANGEMENTS**

**135.** The quantitative estimates for this option are based on in-depth mapping of specific legislative and compliance requirements. The directional costing focuses on the potential impact on charities.

### **Charities' compliance burden**

**136.** Under Option 1 no reduction of duplication would occur.

**137.** Table 6 on page 102 presents an estimate of the duplication burden that arises from the differences between existing regulatory requirements of States and Territories and the proposed ACNC governance and reporting requirements. This estimate of regulatory duplication costs are incurred by incorporated associations and cooperatives (on a per-year and one-off basis).

### **Overall effect on duplication burden**

**138.** Duplication is not reduced as no change occurs.

### **Ease of implementation (including administrative costs)**

**139.** No implementation required as no change occurs.

### **Impact on revenues collected**

**140.** Revenues collected by States and Territories are unchanged as charities still report to State and Territory regulators.

### **Impact on administrative costs of ongoing regulatory activity**

**141.** No change in the cost of compliance enforcement for States and Territories.

## **OPTION 2: SHARING OF REGULATORY FUNCTIONS**

**142.** DAE notes that costing this option reliably is complex as it is not clear to what extent duplication will be reduced.

### **Charities' compliance burden**

143. Under this option charities still have to comply with State and Territory and ACNC requirements especially for the AIS and AFS.

### **Overall effect on duplication burden**

144. Duplication is likely to be slightly reduced.

### **Ease of implementation (including administrative costs)**

145. Implementation could occur in the short term. Some COAG negotiation and process change is required (change of forms, information requirements at State and Territory level to align with ACNC).

146. No legislative change is required.

### **Impact on revenues collected**

147. Revenues collected by States and Territories unchanged as charities still need to report twice.

### **Impact on administrative costs of ongoing regulatory activity**

148. There may be a potential increase in the cost of enforcement for States and Territories as they are delegated ACNC responsibility (and may have to report to ACNC on compliance).

## **OPTION 3: CHANGES TO COMMONWEALTH LEGISLATION TO ADOPT A COMMON REGULATORY PRACTICE**

149. DAE notes that costing this option accurately is complex as it is not clear to what extent duplication will be reduced.

### **Charities' compliance burden**

150. If the ACNC requirements are changed to reflect the most common or most cost effective State and Territory arrangements charities will still need to report to both the State or Territory regulator and the ACNC but the requirements would be more harmonised.

### **Overall effect on duplication burden**

151. Duplication will be reduced considerably due to harmonisation.



### **Ease of implementation (including administrative costs)**

- 152.** Implementation could occur in the medium term. Considerable work and COAG negotiation is required to define and agree to the most common/cost effective State and Territory arrangements. Considerable process change and legislative change is required by the ACNC (compared to the proposed regulations). Considerable process and legislative change is required by the non-common/cost effective State and Territories.

### **Impact on revenues collected**

- 153.** Revenues collected by States and Territories are unchanged as charities still need to report twice.

### **Impact on administrative costs of ongoing regulatory activity**

- 154.** There should be no change to the cost of enforcement for common/cost effective States and Territories and potential change of the cost of enforcement for non-common/effective State and Territories.

## **OPTIONS 4: CHANGES TO STATES' AND TERRITORIES' LEGISLATION TO REDUCE DUPLICATION**

- 155.** Costing the option accurately is complex as it is not clear to what extent duplication will be reduced.

### **OPTION 4A – HARMONISING CHARITIES' COMPLIANCE BURDEN**

- 156.** State and Territories will need to change their legislation to reflect ACNC governing rules and reporting requirements. States and Territories will require the same information as the ACNC for AIS and AFS.

### **OPTION 4B – CARVING OUT CHARITIES' COMPLIANCE BURDEN**

- 157.** State and Territories could exercise present administrative discretions or change relevant legislation to exclude charities from having to comply with the State and Territory legislation wherever an ACNC requirement exists at the Commonwealth level.

### **Charities' compliance burden**

- 158.** Option 4A will result in charities meeting one set of requirements but potentially having to provide that information twice (to the extent of the agreement reached).

159. Option 4B will result in charities meeting one set of requirements and potentially having to provide that information only once (to the extent of the agreement reached).

**Overall effect on duplication burden**

160. Both options 4A and 4B largely reduce duplication.

**Ease of implementation (including administrative costs)**

161. Both options would require long term implementation as considerable COAG negotiation, process change and legislative change is required.

**Impact on revenues collected**

162. Option 4A would leave State and Territory revenues unchanged as charities still have to report twice but option 4B would reduce revenues collected by States and Territories as charities no longer need to report twice.

**Impact on administrative costs of ongoing regulatory activity**

163. There should be no change to the cost of enforcement for States and Territories under Option 4A. Option 4B would reduce the cost of enforcement because charities would no longer be subject to regulation by the States and Territories.

**OPTION 5: REFERRAL OF POWER TO REGULATE CHARITIES BY STATES AND TERRITORIES TO THE COMMONWEALTH**

164. Costing the option accurately is complex as it is not clear to what extent duplication will be reduced. The following assumes that the referral relates to all States and Territories and all entity types.

**Charities' compliance burden**

165. All duplication costs are removed.

**Overall effect on duplication burden**

166. This largely eliminates duplication.

**Ease of implementation (including administrative costs)**

167. This would require long term implementation as considerable COAG negotiation, process change and legislative change is required

**Impact on revenues collected**

- 168.** This would reduce revenues collected by States and Territories as charities no longer need to report twice.

**Impact on administrative costs of ongoing regulatory activity**

- 169.** This would reduce the cost of enforcement because of referral of responsibility from States and Territories to ACNC.

<b>Consultation question:</b>
16. Do the cost assumptions underlying the impact analysis appear reasonable? If not, what changes would you like to suggest?
17. Does the summary of the impact of Options 1 to 5 appear reasonable? If not, what changes would you like to suggest?

# LIST OF CONSULTATION QUESTIONS

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Governance requirements	
Question	Page reference
<b>Standard 1 – purposes and not-for-profit nature of a registered entity</b>	
<p>A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 1, the <i>purposes and not-for-profit nature of a registered entity</i> that have not been identified above?</p> <p>B. Are there other impacts or unintended consequences that have not been identified?</p> <p>If possible, please comment on how the standard would impact on regulatory duplication for the following entity types:</p> <ul style="list-style-type: none"> <li>• Incorporated associations</li> <li>• Cooperatives</li> <li>• Charitable trusts</li> <li>• Unincorporated associations</li> <li>• Other bodies</li> </ul>	27
<b>Standard 2 – accountability to members</b>	
<p>A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 2, <i>accountability to members</i> that have not been identified above?</p> <p>B. Are there other impacts or unintended consequences that have not been identified?</p> <p>If possible, please comment on how the standard would impact on regulatory duplication for the following entity types:</p> <ul style="list-style-type: none"> <li>• Incorporated associations</li> <li>• Cooperatives</li> <li>• Charitable trusts</li> <li>• Unincorporated associations</li> <li>• Other bodies</li> </ul>	28

<b>Standard 3 – compliance with Australian law</b>	
<p>A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 3, <i>compliance with Australian law</i> that have not been identified above?</p> <p>B. Are there other impacts or unintended consequences that have not been identified?</p> <p>If possible, please comment on how the standard would impact on regulatory duplication for the following entity types:</p> <ul style="list-style-type: none"> <li>• Incorporated associations</li> <li>• Cooperatives</li> <li>• Charitable trusts</li> <li>• Unincorporated associations</li> <li>• Other bodies</li> </ul>	28
<b>Standard 4 – responsible management of financial affairs</b>	
<p>A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 4, <i>responsible management of financial affairs</i> that have not been identified above?</p> <p>B. Are there other impacts or unintended consequences that have not been identified?</p> <p>If possible, please comment on how the standard would impact on regulatory duplication for the following entity types:</p> <ul style="list-style-type: none"> <li>• Incorporated associations</li> <li>• Cooperatives</li> <li>• Charitable trusts</li> <li>• Unincorporated associations</li> <li>• Other bodies</li> </ul>	29
<b>Standard 5 – suitability of responsible entities</b>	
<p>A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 5, <i>suitability of responsible entities</i> that have not been identified above?</p> <p>B. Are there other impacts or unintended consequences that have not been identified?</p> <p>If possible, please comment on how the standard would impact on</p>	31

<p>regulatory duplication for the following entity types:</p> <ul style="list-style-type: none"> <li>• Incorporated associations</li> <li>• Cooperatives</li> <li>• Charitable trusts</li> <li>• Unincorporated associations</li> <li>• Other bodies</li> </ul>	
<b>Standard 6 – duties of responsible entities</b>	
<p>A. Are there other duplicative requirements between state and territory legislation, and Governance Standard 6, <i>duties of responsible entities</i> that have not been identified above?</p> <p>B. Are there other impacts or unintended consequences that have not been identified?</p> <p>If possible, please comment on how the standard would impact on regulatory duplication for the following entity types:</p> <ul style="list-style-type: none"> <li>• Incorporated associations</li> <li>• Cooperatives</li> <li>• Charitable trusts</li> <li>• Unincorporated associations</li> <li>• Other bodies</li> </ul>	35
<b>Reporting requirements</b>	
<b>Entity tiers</b>	
<p>A. Are there other duplicative requirements that have not been identified between the reporting tiers in state and territory legislation and the reporting tiers in the ACNC Act?</p> <p>B. Are there other impacts or unintended consequences that have not been identified?</p> <p>If possible, please comment on how this reporting requirement would impact on regulatory duplication for the following entity types:</p> <ul style="list-style-type: none"> <li>• Incorporated associations</li> <li>• Cooperatives</li> <li>• Charitable trusts</li> <li>• Unincorporated associations</li> <li>• Other bodies</li> </ul>	38

<b>Annual information statements</b>	
<p>A. Are there other duplicative requirements between state and territory legislation, and the Annual Information Statement reporting requirements that have not been identified above?</p> <p>B. Are there other impacts or unintended consequences that have not been identified?</p> <p>If possible, please comment on how this reporting requirement would impact on regulatory duplication for the following entity types:</p> <ul style="list-style-type: none"> <li>• Incorporated associations</li> <li>• Cooperatives</li> <li>• Charitable trusts</li> <li>• Unincorporated associations</li> <li>• Other bodies</li> </ul>	40
<b>Annual financial statements</b>	
<p>A. Are there other duplicative requirements between state and territory legislation, and the Annual Financial Statement reporting requirements that have not been identified above?</p> <p>B. Are there other impacts or unintended consequences that have not been identified?</p> <p>If possible, please comment on how this reporting requirement would impact on regulatory duplication for the following entity types:</p> <ul style="list-style-type: none"> <li>• Incorporated associations</li> <li>• Cooperatives</li> <li>• Charitable trusts</li> <li>• Unincorporated associations</li> <li>• Other bodies</li> </ul>	42
<b>Notifying ACNC of change of particulars</b>	
<p>A. Are there other duplicative requirements between state and territory legislation, and the requirement to notify the ACNC of change of particulars that have not been identified above?</p> <p>B. Are there other impacts or unintended consequences that have not been identified?</p> <p>If possible, please comment on how this reporting requirement would impact on regulatory duplication for the following entity types:</p>	43

<ul style="list-style-type: none"> <li>• Incorporated associations</li> <li>• Cooperatives</li> <li>• Charitable trusts</li> <li>• Unincorporated associations</li> <li>• Other bodies</li> </ul>	
<b>Proposed options</b>	
Are there other feasible options to address regulatory duplication that have not been identified? If you identify other feasible options, please describe the option and highlight the key advantages and disadvantages.	50
For each option, are there other advantages and disadvantages that you think jurisdictions should consider?	50
Which option do you consider that jurisdictions should pursue? Why do you prefer this option?	50
Do you have any other suggestions on how to minimise costs arising from regulatory duplication?	50
If jurisdictions decide to pursue an option other than the status quo, do you have any suggestions on how to manage the cost of transition?	50
<b>Impact analysis</b>	
Do the cost assumptions underlying the impact analysis appear reasonable? If not, what changes would like to suggest?	58
Does the summary of the impact of Options 1 to 5 appear reasonable? If not, what changes would like to suggest?	58



# APPENDIX A - DETAILED IMPACT OF DRAFT GOVERNANCE STANDARD 1

## PURPOSES AND NOT-FOR-PROFIT NATURE OF A REGISTERED ENTITY

### Impact for incorporated associations

Most jurisdictions require the governing rules of incorporated associations to include information on the purpose of the entity or demonstrate a NFP purpose to obtain registration.<sup>54</sup> The legislation generally requires an association to demonstrate its “purposes and its character” as a not-for-profit entity, eg by providing a definition of “pecuniary gain” or listing indicators of whether it is carried on for profit or gain of its members.<sup>55</sup> Each jurisdiction has slightly different terms and devices to assist in determining pecuniary gain to members and it is not clear whether these may differ from the boundary lines in the proposed ITAA definition of ‘not-for-profit’.<sup>56</sup> NSW and Victoria have requirements that, on dissolution, any unused monies from government grants etc must be returned to the government.<sup>57</sup> ATO administrative practice has been to allow such departures in currently registered charities.<sup>58</sup> Provided that the ACNC adopts this position<sup>59</sup> there is not likely to be any change required.

The State and Territory legislation does not expressly impose a requirement to make information about the incorporated association’s purposes available to the public. The ACNC will maintain a register for public disclosure which is sufficient on the basis of the note

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<sup>54</sup> NSW s 6(3); Vic s 47(1)(b); Qld s 5(1); WA s 4(2); SA s 23A(1); Tas s 7(2)(ii); ACT s 14(2); NT s 8(3)(b).

<sup>55</sup> NSW ss 40 and 65; Vic ss 7(2)(a) and 33; Qld Regs, Sched 3; WA s 33 and Sched 1; SA s 218(5); Tas ss 16(2) and 21(2); ACT s 18(1)(b)(ii); NT s 13A.

<sup>56</sup> See discussion of the definition of ‘not-for-profit’ on pp. 26.

<sup>57</sup> NSW s 65(4); Vic s 132(3).

<sup>58</sup> Refer TR 2001/4 at para 240 “In limited circumstances, it may be accepted that an institution is not for private profit even if its constituent documents do not contain these clauses. Examples are where a corporation is formed by statute and its provisions make the not for private profit nature clear, or where a trust is established by deed or will providing that the property can be used for charitable purposes only.”

<sup>59</sup> It is not clear whether the ACNC Commissioner will adopt the same administrative practices as the ATO. The ACNC website does state that ATO rulings are not binding on the ACNC but does not comment on administrative practice – see ACNC website [http://www.acnc.gov.au/ACNC/Pblctns/Factsheets/FS\\_Charity/ACNC/FTS/Fact\\_Charity.aspx?hkey=052e737a-59f4-4af7-a460-27386217863d](http://www.acnc.gov.au/ACNC/Pblctns/Factsheets/FS_Charity/ACNC/FTS/Fact_Charity.aspx?hkey=052e737a-59f4-4af7-a460-27386217863d) (accessed 19 January 2012).

accompanying the draft regulation. State and Territory regulators are already required to, and do, provide public access to associations' records.<sup>60</sup>

The obligation to comply with its purposes and its character as a NFP is explicit in some jurisdictions<sup>61</sup> and implicit in others.<sup>62</sup> However, no action will be required to comply with this standard because an entity would be expected to comply with its NFP purposes and character.

### **Impact for cooperatives**

Cooperatives may take two forms: trading and non-trading. A non-trading cooperative is defined<sup>63</sup> as a co-operative whose rules prohibit it from giving returns or distributions on surplus or share capital to members, other than the nominal value of shares, if any, at winding-up.<sup>64</sup> A non-trading cooperative will be referred to as a non-distributing cooperative (ND cooperative) under the CNL.<sup>65</sup> Cooperatives may have share capital but cooperatives formed for a charitable purpose will generally not have share capital.

In Western Australia a ND cooperative that has operated as a mutual entity may provide in its rules that:

- (a) surplus funds are payable only to members who have paid contributions to the cooperative and have a credit balance in their member's ledger; and
- (b) the payment of surplus funds is limited to the return of the contributions paid by the member to the cooperative and the nominal paid up value of the shares, if any.<sup>66</sup>

This optional transitional rule for a ND cooperative operating as a mutual in Western Australia would not satisfy the NFP definition, as surplus funds can be paid to members. However, ATO administrative practice appears to waive these deviations as noted above with incorporated associations.

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<sup>60</sup> See NSW s 98.

<sup>61</sup> See Vic ss 34(c) and 67(2)(b).

<sup>62</sup> See NSW s 76(1)(f).

<sup>63</sup> NSW s 15; Vic s 15; ACT s 18(1); SA s 15; WA s 14; Tas s 14; NT s 15(1); Qld s 15(1).

<sup>64</sup> NSW Schedule 1.3; Vic Schedule 1.3; ACT Schedule 2.3; SA Schedule 1.3; WA Schedule 1.3(a); Tas Schedule 3.3; NT Schedule 1.3; Qld Schedule 1.3; CNL Schedule 1.3

<sup>65</sup> The term non-distributing (ND) is used in this paper to refer to cooperatives that have charitable purposes (and are therefore eligible for Commonwealth tax concessions).

<sup>66</sup> WA Schedule 1.3(b)

In all jurisdictions, the rules may state the objects of the cooperative.<sup>67</sup> The rules must also state at least one primary activity of the cooperative.<sup>68</sup> Although there is no legislative requirement to state purpose and NFP character in the rules, the reference to primary activity appears to be equivalent. A ND cooperative is likely to have a primary activity that is charitable. There is not likely to be any change required by a ND cooperative.

The public can inspect and obtain copies of cooperatives documents held by the Registrar in all States and Territories. This makes information about purposes and NFP character available. Information will also be published through the ACNC's publicly available register. No action will be required to comply with the standard.

The obligation to comply with its purposes and character as a NFP arises from the definition of a ND cooperative. This will not require any change because an entity would be expected to comply.

### **Impact for charitable trusts**

Charitable trusts will in almost all cases be established by a deed (or will in the case of a testamentary trust) that will state the purposes of the trust. There is unlikely to be any reference in a will to a charitable trust being "not-for-profit", but the NFP condition is assumed in the law of equity which applies to such trusts. Other types of charitable trusts often do not contain an explicit NFP clause, but again this is assumed in equity. State and Territory legislation dealing with trusts does not impose such an obligation. Private Ancillary Funds (1,041 as at 14 January 2013) which follow the ATO model trust deed will satisfy the NFP requirement,<sup>69</sup> as will Public Ancillary Funds (1,783 as at 14 January 2013).<sup>70</sup> There is no duplication with State and Territory regulation.

There is no general law obligation to provide information to the public. The State and Territory legislation dealing with trusts does not impose such a requirement. However, as information will be available to the public through the ACNC register no changes will be required.

The trustee of a charitable trust is required by the general law of equity to comply with the terms of the trust. The State and Territory legislation dealing with trusts does not impose such a requirement. No change is required.

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<sup>67</sup> NSW s 107; Vic s 107; ACT s 103; SA s 102; WA s 98; Tas s 100; NT s 102; Qld s 101.

<sup>68</sup> NSW s 118; Vic s 122; ACT s 122; SA s 117; WA s 113; Tas s 115; NT s 117; Qld s 116.

<sup>69</sup> Public Ancillary Fund model trust deed:  
<http://www.ato.gov.au/nonprofit/content.aspx?doc=/content/00294093.htm>

<sup>70</sup> Public Ancillary Fund Guidelines 2011: <http://www.comlaw.gov.au/Details/F2011L02758>

### **Impact for unincorporated associations and other bodies**

These charities are not subject to State or Territory legislation and therefore there is no duplication for these charities.

# APPENDIX B - DETAILED IMPACT OF DRAFT GOVERNANCE STANDARD 2

## ACCOUNTABILITY TO MEMBERS

### Impact for incorporated associations

All incorporated associations are required to have members. There are requirements under the legislation in most jurisdictions to hold an Annual General Meeting (AGM)<sup>71</sup> and non-uniform requirements about the information to be provided to members. There is nothing explicit that gives members an opportunity to express concerns or to make decisions although in all jurisdictions (except WA and SA) 5 per cent of members may request a special meeting of the association (10 per cent in Tasmania and Victoria and half the members under the Model Rules in NT). The proposed standard (at *Note 2*) states that holding an AGM with a question and answer session will satisfy the standard. Committee members can be appointed, rather than elected by the members, except in Queensland. While associations have to hold AGMs and provide financial statements to members, no legislation requires reporting towards achieving the association's purposes as suggested in *Note 1*. However, this may be satisfied by the specific report on such matters made through the Annual Information Statement (AIS) submitted by all registered entities to the ACNC for its public register.

This standard does not explicitly require any record or demonstration that the association has taken reasonable steps, and therefore it will not impose an added compliance burden. However, some entities may need to record evidence of reasonable steps being taken where they might depart from the norm. This may be of more importance where committee members are appointed (not elected) outside the membership or membership is closely held. No other action will be required.

### Impact for cooperatives

All cooperatives are required to have members. Legislation in all States and Territories requires cooperatives to hold AGMs.<sup>72</sup> Mandatory requirements for inclusion in the rules include holding of general meetings (including an AGM) and special meetings, meeting procedures, election of directors, and grievance procedures. If the AGM is not called, or for some other reason, 20 per cent of members (or a lesser number provided for in the rules) can call for a general meeting to be convened. The CNL will have provisions enabling

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<sup>71</sup> For example, Vic s63

<sup>72</sup> NSW s 198, Vic s204, ACT s204, SA s199, WA s190, Tas s203, NT s199, QLD s198

members to ask questions at a general meeting<sup>73</sup> and members must be able to question the auditor or make comments about the audit.<sup>74</sup> Current legislation of States and Territories does not specifically provide for the ability of members to ask questions at general meetings, but by practice such a facility is adopted through meeting procedures.

The requirements for content and presentation of financial statements are covered by legislation and the rules. The financial accounts of the cooperative (and any subsidiaries) for the last financial year must be presented to members at the AGM, together with an auditor's report.<sup>75</sup> Small cooperatives incorporated in WA may not need to lodge an annual report, but the rules need to ensure financial accountability to members including a directors' solvency resolution.

There will be some duplication between the ACNC and State and Territory legislation. However, no change is required to meet this standard and therefore no compliance costs.

#### **Impact for charitable trusts**

Charitable trusts are purpose trusts and do not have members. This standard will not apply.

#### **Impact for unincorporated associations and other bodies**

These charities are not subject to State or Territory legislation and therefore there is no duplication for these charities.

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<sup>73</sup> CNL s 261.

<sup>74</sup> CNL s 262.

<sup>75</sup> In WA, small cooperatives do not have to have financial statements audited unless directed. Under the CNL, small cooperatives will most likely not have to have financial statements audited.

# APPENDIX C - DETAILED IMPACT OF DRAFT GOVERNANCE STANDARD 3

## COMPLIANCE WITH AUSTRALIAN LAW

### **Impact for incorporated associations**

There are no express statutory requirements in State or Territory laws to comply with Australian law, but officers must generally comply with the governing rules and the relevant Act and officers may be made liable for breaches of the Act. There will be no duplication and no compliance costs from this standard.

### **Impact for cooperatives**

There are no express statutory requirements in State or Territory cooperatives laws to comply with Australian law. However current legislation in all States and Territories, and the CNL, provide that a cooperative can be wound up, engagements transferred, or an administrator appointed if the cooperative exists for an illegal activity. There will be no duplication and no compliance costs from this standard.

### **Impact for charitable trusts**

Private Ancillary Funds and Public Ancillary Funds are required to comply with Australian laws.<sup>76</sup> While there are no express requirements on other charitable trusts to comply with Australian laws, a trust for an illegal purpose will generally be unenforceable. There will be no duplication and no compliance costs from this standard.

### **Impact for unincorporated associations and other bodies**

These charities are not subject to State or Territory legislation and therefore there is no duplication for these charities.

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<sup>76</sup> Private Ancillary Fund Guidelines 2009, s 48; Public Ancillary Fund Guidelines 2011, s 47.

# APPENDIX D - DETAILED IMPACT OF DRAFT GOVERNANCE STANDARD 4

## RESPONSIBLE MANAGEMENT OF FINANCIAL AFFAIRS

### Impact for incorporated associations

State and Territory incorporated association legislation does not contain an express directive about managing financial affairs responsibly. There are provisions requiring associations to maintain certain financial records, requirements for bank accounts, drawing of cheques, and financial reporting and audits which contribute to minimum financial standards.<sup>77</sup> While not all associations must be audited under the legislation, associations may nevertheless include it in their rules or constitution. Some jurisdictions have insolvent trading provisions that apply to committee members.<sup>78</sup>

Incorporated associations will be required to take reasonable steps to manage financial affairs in a responsible manner. Incorporated associations should meet this standard already and there will be little added burden.

### Impact for cooperatives

Under State and Territory legislation the rules of a cooperative must include:

- (a) The manner in which the funds of the cooperative are to be managed, and in particular the mode of drawing and signing cheques, drafts, bills of exchange, promissory notes, and other negotiable instruments for and on behalf of the cooperative; and
- (b) Provision for the financial statements of the cooperative to be audited annually or more frequently and the manner of appointment of the auditor.<sup>79</sup>

There are also comprehensive legislative obligations regarding financial records; reports; registers and fraud prevention measures. There is unlikely to be any additional compliance cost to meet this standard.

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<sup>77</sup> For example, NT s41.

<sup>78</sup> For example, SA s49AD.

<sup>79</sup> These requirements are in a schedule to the Cooperatives legislation.



### **Impact for charitable trusts**

Trustees are required to manage financial resources in a responsible manner under the equitable law of trusts. There are no statutory requirements to manage risk, except in the case of investment management where this would form part of the duties of a trustee. These requirements are supplemented by the legislation, for example, there is a statutory requirement in all jurisdictions that the trustee not put trust funds into hazardous or speculative investments unless specifically authorised by the trust deed.<sup>80</sup> There is also a requirement to take into account certain matters in relation to investment including the risk associated with the investment.<sup>81</sup> There are no express requirements to establish and maintain processes for managing financial risk generally. There is likely to be little impact on the vast majority of charitable trusts.

### **Impact for unincorporated associations and other bodies**

These charities are not subject to State or Territory legislation and therefore there is no duplication for these charities.

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<sup>80</sup> For example, NSW s14B.

<sup>81</sup> For example, NSW s14C.

# APPENDIX E – DETAILED IMPACT OF DRAFT GOVERNANCE STANDARD 5

## SUITABILITY OF RESPONSIBLE ENTITIES

### Impact on incorporated associations

There are criteria for eligibility to hold office in an incorporated association in Queensland, South Australia, Victoria the ACT and Northern Territory.<sup>82</sup> The disqualifying criteria for directors relate (inter alia) to insolvency under the *Bankruptcy Act 1966* and indictable offence convictions. There is some duplication with the criteria for eligibility and disqualification under the ACNC Act but no additional compliance burden. However, the standard also requires the charity to take steps to ensure the officer is suitable and to remain satisfied as to suitability. The standard says the charity may obtain signed declarations from prospective committee members and search public registers.

Incorporated associations in all jurisdictions will need to take appropriate steps, both before appointment of officers and on an ongoing basis, to ensure the association meets the requirement 'to remain satisfied' or to remove the office holder, under draft standard 5 (2)(b). This should be a relatively minor compliance burden assuming that most organisations would have procedures for determining suitability of officers.

The requirement to take 'reasonable steps to remove' an offending responsible entity may be complicated when the incorporated association does not have the power to remove and replace such persons. This may require a change to the charity's rules.

### Impact on cooperatives

Cooperatives are managed by boards of directors (usually active members of the cooperative). Legislation for all jurisdictions provides for qualification of directors and sets grounds for disqualification in similar terms as those applying to office holders under the *Corporations Act 2001*. Specifically, a person must not act as a director or take part in or be concerned with the management of a cooperative (either directly or indirectly):

- within 5 years after being convicted of an offence under the cooperatives legislation, except with leave of the Supreme Court; or
- if disqualified from managing a corporation under Part 2D.6 of the *Corporations Act*;  
or
- if insolvent under administration, as defined in s 9 of the *Corporations Act*.

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<sup>82</sup> S 61A QLD; s 30 SA; s 78 Vict; s 63 ACT; and s 30 NT.

The cooperatives legislation does not oblige the cooperative to make inquiries or search public registers, but it is an offence for a disqualified person to manage a cooperative and there is an automatic disqualification for offences against the State or Territory legislation.

Draft standard 5 (2) (b) will require a process to establish satisfaction. Since the current State and Territory provisions meet the requirements of this standard, there should be no additional compliance costs for cooperatives. If “reasonable steps” to remain satisfied need to be demonstrated, processes may have to be established, although it is likely these are already in place to meet the current legislation. The requirement to take ‘reasonable steps to remove’ an offending responsible entity may be complicated when the cooperative does not have the power to remove and replace such persons. This may require a change to the charity's rules.

### **Impact on charitable trusts**

There are currently no State or Territory laws which impose criteria for qualification or disqualification of trustees, including laws in relation to *Corporations Act* or ACNC disqualification. However, insolvency under the *Bankruptcy Act 1966* (Cth) and conviction of an indictable offence may be grounds for removal or replacement of trustees by the Court on the application of the Attorney General.<sup>83</sup>

The *Public Ancillary Fund Guidelines 2011* and the *Private Ancillary Fund Guidelines 2009* prohibit anyone who has been convicted of certain taxation offences from acting as a trustee or a director of a trustee.<sup>84</sup> Standard 5 (2) (b) will require a process to establish satisfaction as to suitability.

Settlers will need to take steps such as searching the public registers of the ACNC and ASIC, or securing signed declarations from prospective trustees to ensure the trust complies with this standard. This will be a minor compliance burden, however steps will need to be taken to ensure the trust meets the requirement “to remain satisfied” or to remove the office holder, under (2)(b). (Since all trustees are jointly and severally liable for breaches of trust, it is likely that such processes are already in place in most charitable trusts.) ‘Taking reasonable steps to remove’ an offending responsible entity may be complicated when the trustees do not have the power to remove and replace such persons, for example, the settlor may reserve the right to appoint trustees or give the power to someone else outside the trust.

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<sup>83</sup> For example, s 80 Qld Trusts Act 1973.

<sup>84</sup> Public Ancillary Fund Guidelines 2011, s 16; Private Ancillary Fund Guidelines, s 16.

### **Impact on unincorporated associations and other bodies**

These charities are not subject to State or Territory legislation and therefore there is no duplication for these charities.

# APPENDIX F - DETAILED IMPACT OF DRAFT GOVERNANCE STANDARD 6

## DUTIES OF RESPONSIBLE ENTITIES

### Impact on incorporated associations

Some duties of office holders are embedded in the rules or constitution of the incorporated association or are required under the State or Territory legislation. Most commonly these deal with misuse of the officer's position or with the property of the entity.<sup>85</sup> They are less likely to deal with the standard of care required to be exercised by the officer.<sup>86</sup>

In the absence of statutory duties, the common law is likely to impose duties on corporate office holders.

In the majority of jurisdictions there are currently no legislative provisions imposing a duty to prevent insolvent trading or making committee members liable for insolvent trading. The exception is NSW (s 68). South Australia and Victoria apply the *Corporations Act* provisions.<sup>87</sup>

Incorporated associations will need to 'take reasonable steps' to ensure each responsible entity is 'subject to' the duties in this standard.<sup>88</sup> The separate consultation paper on the draft governance standards suggests that this could be achieved by adopting a board charter or code of conduct, amending the constitution or rules, or under a separate legal instrument eg a letter of appointment. Alternatively they could rely on pre-existing statutory duties where they apply in certain jurisdictions. The question of what will satisfy reasonable steps may depend on characteristics of the association, such as duties prescribed in their incorporating jurisdiction.

### Impact on cooperatives

Cooperatives legislation already imposes duties, for which a breach can result in civil or criminal penalties. There are duties:

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<sup>85</sup> For example, NSW, Vic, SA and NT.

<sup>86</sup> But see Vic and SA.

<sup>87</sup> NSW s 68; SA s 49AD; Vic s 152.

<sup>88</sup> The following discussion is on the basis that the words 'subject to' do not require the charity to enter into a legally enforceable agreement with each responsible entity. The analysis is on the basis that the words 'subject to' merely requires an arrangement such as a board charter or code of conduct. For further information about draft governance standard 6, see the separate consultation paper on the draft governance standards.

- (a) to act honestly;
- (b) to act with reasonable care;
- (c) to not improperly use position or information; and
- (d) to avoid conflicts of interest.

Cooperatives are required to record every declaration of interest in the minutes of the meeting at which the declaration was made. However, if the ACNC requires cooperatives to record declarations of interests in a different manner than currently provided for in cooperatives legislation, this would involve duplication.

While officers of cooperatives are required to disclose actual or perceived conflicts of interests there are certain interests that do not need to be disclosed. These relate to an interest in a contract or proposed contract that is:

- (a) for a purchase of goods and services by the director from the co-operative; or
- (b) a lease of land to the director by the co-operative; or
- (c) for the sale of commodities or animals by the director to the co-operative; or
- (d) under the rules of the co-operative, may be made between the co-operative and a member; or
- (e) a class of contracts prescribed by regulations,

The contract must be made in good faith, in the ordinary course of the business of the cooperative, and on the usual and proper terms of similar dealings between the cooperative and its members. If applicable, the exception of certain interests of directors from disclosure requirements may not satisfy the ACNC governance standard for full disclosure of perceived or actual material conflicts of interest. However, these types of contracts are more likely for trading cooperatives and are unlikely to arise for ND cooperatives.

All jurisdictions, except ACT, Tasmania and Northern Territory, currently apply section 588G of the *Corporations Act* to impose a duty on a director not to allow the cooperative to operate while insolvent. A directors' declaration on whether, in the directors' opinion, there are reasonable grounds to believe that the cooperative will be able to pay its debts as and when they become due and payable must be included in the Annual Report. Tasmania currently requires a directors' report containing 'true and fair' and 'solvency' statements to be attached to all financial statements prepared for members. Although some jurisdictions do not have an equivalent provision, most have committed to introducing the CNL. As the CNL provides for this duty and director's declaration as to solvency there will be no requirement to take further action and no compliance cost. If a jurisdiction does not introduce the CNL (or equivalent legislation), cooperatives in those jurisdictions may have to amend their rules to comply with the ACNC requirements.

Directors of a cooperative have existing statutory duties in respect of acting honestly; acting with reasonable care and not to improperly use their position or information and would

satisfy the corresponding proposed ACNC duties and therefore no additional actions would be required by the cooperative to meet the standard.

**Impact on trusts, unincorporated associations and other bodies**

These charities are not subject to State or Territory legislation and therefore there is no duplication for these charities.

# APPENDIX G - DETAILED IMPACT OF ENTITY SIZE REPORTING

## **Incorporated Associations**

Most jurisdictions have classifications for incorporated associations that result in different reporting obligations depending on size, but these vary. Some jurisdictions have two classifications; some have three; some base the classification on revenue (or receipts); and some consider revenue and assets. The thresholds for the different classification also differ.

**NSW** has 2 tiers:

- Tier 2: < \$250,000 gross receipts or < \$500,000 assets;
- Tier 1: > \$250,000 gross receipts or > \$500,000 assets.

**Victoria** has recently introduced three tiers identical to those provided for in the *Corporations Act 2001* for companies limited by guarantee. The tiers are the same as the ACNC classification.

**Queensland** also has 3 levels:

- level 3: current revenue and assets < \$20,000;
- level 2: not level 1 or level 3;
- Level 1: current revenue or assets > \$100,000.

**The Northern Territory** has 3 tiers:

- tier 1: gross annual receipts of less than \$25,000 and gross assets of less than \$50,000;
- tier 2: gross annual receipts between \$25,000 and \$250,000 and gross assets of between \$50,000 and \$500,000; and
- tier 3: gross annual receipts of more than \$250,000 and gross assets of more than \$500,000.

**South Australia** and **Australian Capital Territory** have 'prescribed associations' ie. those with gross receipts in excess of \$500,000 that are subject to certain reporting requirements (non-prescribed associations are those with gross receipts of less than that amount and are not subject to the reporting requirements).

**Tasmania** has no formal classification but certain entities are exempt from auditing requirements (s 24(1B)). An association can seek an exemption if:

- total revenue of \$40,000 or less; and



- total assets of \$40,000 or less (other than real estate): and
- a three quarter majority of members present at the meeting have voted in favour of not having the association's accounts audited; and
- the association has provision in its rules for members to requisition a special general meeting.

**Western Australia** has no differentiation between entities of different size. WA does not require incorporated entities to lodge reports, but they must present reports to members at an AGM.

All States and Territories (other than WA) have a requirement for incorporated associations to lodge reports. These tend to be less onerous than ACNC requirements.

All incorporated associations (other than those in Victoria) need to consider both ACNC and State or Territory classification in relation to reporting requirements. This gives rise to compliance costs as follows:

- Administrative action/external advice to determine Tier (one-off);
- Administrative action/external advice to ensure continued eligibility (on-going);
- Some entities may have to submit reports where previously they were not required to (see below).

### **Cooperatives**

For cooperatives, the present position in all States and Territories (other than WA) is that there is no classification according to size, so that all cooperatives, including non-distributing cooperatives, have reporting obligations.

In WA, the position for non-distributing cooperatives is that they are considered 'small'<sup>89</sup> and not generally required to lodge financial reports; unless they have consolidated gross revenue of \$200,000 or consolidated gross assets of \$500,000, in which case they will be considered 'large' and will have financial reporting obligations. However, small cooperatives in WA do have to lodge an annual return with the Registrar listing the current secretary, the directors and the chief executive officer of the cooperative and of each of its subsidiaries.

Under the proposed Cooperatives National Law (CNL), a small cooperative will not have to lodge audited financial reports with the Registrar each year but will still have to lodge an

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<sup>89</sup> Co-operatives Regulations 2010 (WA), s 11(3).

annual return containing simple particulars. The draft Regulation specifies information to be included in annual return. A small cooperative means:<sup>90</sup>

- 1) a cooperative that did not raise funds from the public issue of securities (eg shares) and satisfies at least two of:
  - (i) < \$8,000,000 of consolidated revenue (including revenue of any entity it controls);
  - (ii) < \$4,000,000 consolidated gross assets in the previous year (including assets of any entity it controls);
  - (iii) fewer than 30 employees (including by entities the cooperative controls); or
- 2) is declared by regulation to be a small cooperative for that financial year.

Small cooperatives with less than \$750,000 in consolidated revenue (including any controlled entities) and consolidated gross assets less than \$250,000 (including any controlled entity) will not have to include a cash flow statement in their annual return. The classifications under the CNL are different from the ACNC's classifications.

Under the ACNC requirements cooperative companies that are charities with income under \$250,000 will be required to undertake minimal financial reporting to ACNC and cooperatives with income of more than \$250,000 will have some financial reporting requirements (see below). If cooperatives are still required to lodge a return with the relevant State or Territory Registrar, this will be a duplication of lodgement.

Additional or duplicated financial reporting burden may comprise two elements:

- Additional lodgement of financial reports to the ACNC for cooperatives with revenue of more than \$250,000;
- Content of financial statements and auditing requirements (considered below).

Additional lodgement will require administrative action/external advice (annually).

In WA, ND cooperatives with revenue under \$200,000 do not currently have to lodge a financial return with the Cooperatives Registrar and will not have to lodge a financial statement with ACNC (although they will have to lodge an AIS). ND cooperatives with revenue between \$200,000 and \$250,000 are required to lodge a financial return with the Registrar but will not be required to lodge a financial statement with the ACNC (although they will have to lodge an AIS). ND cooperatives with revenue above \$250,000 will have to lodge financial statements with both the Registrar and with ACNC.

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<sup>90</sup> CNL Draft Regulation 1.5.

In all other States and Territories, all cooperatives currently have financial reporting obligations to their respective State or Territory authorities. With the introduction of the CNL, only large cooperatives will have those financial reporting obligations.

As a consequence, there will be additional lodgement requirements to the ACNC, in the form of the AIS (all ND cooperatives). In all States and Territories (including WA), there will be duplication of financial reporting for ND cooperatives with revenue of more than \$250,000, which will now have to lodge financial reports to the ACNC as well as to their State or Territory authority. This will require administrative action/external advice (annually). Under the CNL there will be duplication of financial reporting for large ND cooperatives (ie having to report both to the ACNC and the State or Territory authority).

### **Charitable Trusts**

There are currently no statutory requirements for reporting by charitable trusts and no classification relating to the size of the trust. A corporate trustee will be subject to the *Corporations Act*. The distinction in the *Corporations Act* relevant to reporting obligations is between public companies and proprietary companies. Companies limited by guarantee are public companies.

Although there may be additional requirements for charitable trusts, this will not result in any duplication as the States and Territories do not require charitable trusts to report.

### **Unincorporated Associations and other bodies**

There are currently no statutory requirements for reporting in relation to these charities and size is therefore not relevant. Although there will be additional reporting requirements for unincorporated associations and other bodies,<sup>91</sup> this will not result in any duplication as the States and Territories do not require these charities to report.

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<sup>91</sup> Other than 'basis religious charities'.

# APPENDIX H – DETAILED IMPACT OF ANNUAL INFORMATION STATEMENT

## Incorporated Associations

In most jurisdictions, an incorporated association is required to submit an annual return. However, the requirements relate to financial information and do not include the information required under Sections B and C of the draft transitional AIS.

- In **NSW, Victoria, Queensland, Tasmania**, and the **NT**, all incorporated associations have to lodge some form of financial statement to their regulator. Differences arise in audit requirements. These jurisdictions do not require reports lodged to include the information in sections B and C of the draft transitional AIS, except that the **NT**'s financial statement form<sup>92</sup> requires a Statement by the Management Committee, that includes the principal activity of the entity during the financial year. The committee's report to the AGM must also include the principal activities during the year and any significant changes in activity.
- **WA** does not require incorporated associations to lodge any annual reports but an annual financial report must be prepared and presented to the AGM within 4 months of the end of the financial year.
- **SA** does not require non-prescribed associations to lodge an annual return but prescribed associations must do so. The information required for a prescribed association is financial information and does not include the information required under Sections B and C of the draft transitional AIS.
- In the **ACT** a non-prescribed association does not have to lodge an annual statement with the Registrar-General but must prepare a statement and present it to the annual general meeting (AGM). This statement is generally concerned with financial information but must also state the principal activities of the association during the year. Prescribed associations must lodge an annual statement that contains specified financial information.

Although submitting an AIS to the ACNC will entail additional reporting requirements for incorporated associations at all levels, this will not result in any duplication as the States and Territories do not require this type of information to be submitted.

## Cooperatives

The current position for cooperative companies is that in all States and Territories (other than WA small cooperatives) there is a requirement to lodge an annual report similar to that

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<sup>92</sup> NT s 43(1)(c).

for public companies under the *Corporations Act 2001*. This must include a list of office holders, directors and principal executive officers of the cooperative and its subsidiaries as well as financial information. The State and Territory annual reporting requirement relates to financial information and does not include the information required by Sections B and C of the draft transitional AIS, other than details of the number of employees and volunteers.

In WA, large cooperatives (ie with consolidated gross revenue of \$200,000 or consolidated gross assets of \$500,000) must lodge a report as required in the other jurisdictions. Small cooperatives in WA are required to lodge an annual report but in a simplified format and without financial reports unless required by the Registrar or members.

There will be duplication in relation to the requirements to disclose the number of employees and volunteers to both the State or Territory regulator and the ACNC under Part C of the draft transitional AIS. In relation to the other requirements of the AIS there will be additional reporting requirements for ND cooperatives to submit an AIS, this will not result in duplication as the States and Territories do not require this type of information to be submitted. Duplication in relation to financial reporting is discussed below.

#### **Charitable Trusts**

There are no statutory reporting requirements imposed on charitable trust by the States or Territories. A corporate trustee will be subject to the *Corporations Act*. Although there will be additional reporting requirements for charitable trusts in relation to the AIS, this will not result in any duplication as the States and Territories do not require charitable trusts to report.

#### **Unincorporated Associations and other bodies**

There are no statutory requirements for reporting imposed on unincorporated associations or other bodies by the States or Territories. Although there will be additional requirements in relation to the AIS, this will not result in any duplication as the States and Territories do not require these charities to report.

# APPENDIX I – DETAILED IMPACT OF ANNUAL FINANCIAL STATEMENT REPORTING

## Incorporated Associations

The requirements for financial reporting are different for each jurisdiction.

- In **Victoria** a Tier 1 entity must submit a Financial Statement as part of the Annual Statement. The Financial Statement must “give a true and fair view of the financial position and performance of the association” and otherwise comply with the legislation. The Financial Statement may be reviewed if required by a majority of the members. A committee member must certify that the Financial Statement was considered at the AGM. A Tier 2 entity must prepare its Financial Statement in accordance with the Accounting Standards (AASB) and have it reviewed by an appropriately qualified person in accordance with Auditing Standards. A Tier 3 entity must prepare its Financial Statement in accordance with the Accounting Standards (AASB) and have it audited by an appropriately qualified person in accordance with Auditing Standards.
- In **SA**, a non-prescribed association does not have to submit a Financial Statement. A prescribed association must prepare accounts that “present fairly” the financial position of the association as part of the Annual Statement. The accounts must be audited by a registered company auditor or a firm of registered auditors or a person with an appropriate affiliation or approved by the Corporate Affairs Commission.
- In **Tasmania** (unless exempt) an entity must lodge an Annual Return that includes a financial statement explaining the financial position and transactions of the entity. The Statement must be audited and the auditor must certify that proper records are kept. The return must also include the names and addresses of members of the committee.
- In the **NT** a Tier 1 or Tier 2 entity must prepare the Financial Statement in accordance with AASB or the Regulations. The accounts must be audited by a person who is not a member of the entity or related to a member. There must also be a report signed by 2 members of the committee stating the net profit or loss, the principal activities during the year and any significant change in activities. Tier 3 entities must ensure that the accounts comply with AASB and the auditor must hold appropriate qualifications or be approved by the Commission. The audit must comply with the Auditing Standards.
- In **Queensland**, a Level 3 entity must prepare and submit a Financial Statement along with a verification statement by the President or Treasurer that states the association keeps financial records in a way that properly records its income and expenditure and dealings with assets and liabilities. A Level 2 entity must prepare a Financial Statement and a similar verification statement made by an auditor,

accountant or approved person. A Level 1 entity must prepare a Financial Statement that is audited by a registered auditor or accountant.

- In **NSW** a Tier 2 entity must prepare a Financial Statement that complies with some AASB requirements. No review or audit is required unless directed by the Director-General. A Tier 1 entity must prepare accounts that comply with AASB requirements and the accounts must be audited by a registered auditor, who is not a member, employee or provider of other professional services. The audit must comply with auditing standards unless exempted by the Director-General.
- In **WA** incorporated associations are required to keep accounting records that correctly record and explain the financial position and performance of the association. The accounts must be submitted to the AGM, but are not lodged with the state authority.
- In the **ACT**, a non-prescribed association must present audited accounts to the AGM. A prescribed association must lodge with the Registrar-General audited accounts prepared in accordance with the Act. The auditor must be a registered auditor and the audit must be carried out in accordance with the Act.

The States and Territories impose fees for lodgement of the Annual Report:

<b>Vic</b>	<b>\$50.10</b> (tier 1); <b>\$100.20</b> (tier 2); <b>\$200.50</b> (tier 3)
<b>SA</b>	<b>\$81</b> (on time) + <b>late fee \$31.75</b> (1 month late); <b>late fee \$65.50</b> (>1 month <3 months late) <b>late fee \$138</b> (3+ months late)
<b>NT</b>	<b>\$15</b> (on time); <b>\$36</b> (late)
<b>Tas</b>	<b>\$57.60 – \$79.20</b> (40 fee units on time, 45 fee units up to 1 month late; 55 fee units >1 month late)
<b>NSW</b>	<b>\$51</b> (on time); <b>\$75</b> (<1 month late); <b>\$82</b> (1 month+ late)
<b>WA</b>	<b>No Annual Report</b> required
<b>QLD</b>	<b>\$45</b>
<b>ACT</b>	< \$5000 = <b>nil</b> ; > \$5000 = <b>\$36</b> (on time); <b>\$69</b> (late)

For entities in jurisdictions that do not require lodgement of Financial Statements there will be additional reporting requirements. However, this will not result in any duplication with the State and Territory requirements. For entities in jurisdictions that require Financial Statements to be lodged, but do not require compliance with the AASB, there will be conflicting reporting requirements. Those incorporated associations will need to consider both ACNC and State or Territory requirements in relation to the content of financial reports. This will give rise to compliance costs as follows:

- Administrative action/external advice to comply with both sets of requirements (annually).

This may be offset if the financial report prepared to comply with the ACNC requirements meets the requirements of the State or Territory legislation. In that case, the entity could submit the same financial report to both authorities, which would involve slight additional administrative cost. However currently, most States and Territories also have forms which must be completed and submitted with the financial report. (In the NT, the form satisfies the reporting requirements submitted under Schedule 4 or the Regulations and s 43(1)(c) of the Act.)<sup>93</sup>

For entities in jurisdictions that require the financial report to comply with AASB there will be duplicated requirements. This will give rise to compliance costs as follows:

- Administrative action to lodge two financial statements (annually). This is unlikely to impose a significant cost.<sup>94</sup>

For entities in jurisdiction that do not require accounts to be audited or reviewed and that are not small entities under the ACNC Act, there will be additional requirements to engage an auditor or appropriate person to carry out a review. However, this will not give rise to any duplication with State and Territory requirements.

For entities in jurisdictions that do require a review or audit of the financial statement, other than small entities under the ACNC Act, there may be conflicting requirements about whether there is a review or an audit and the standards required to be met by the reviewer or auditor. Those incorporated associations will need to consider both ACNC and State or Territory requirements in relation to audit or review.

This will give rise to costs as follows:

- External advice to comply with both sets of requirements (annually). This may be offset if the financial report is prepared and either reviewed or audited to comply with the ACNC requirements and this also meets the requirements of the State or Territory.

## **Cooperatives**

The current position for cooperatives is that in all States and Territories (other than WA small co-operatives<sup>95</sup>) there is a requirement to lodge an annual financial report similar to

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<sup>93</sup> A general transitional rule also allows the ACNC to obtain reports from other agencies up to 2015 year where satisfy ACNC requirements.

<sup>94</sup> Previous footnote also applies here.



that for public companies under the *Corporations Act 2001*. Along with financial information, the report must include a list of office holders, directors and principal executive officers of the cooperative and its subsidiaries. In WA, large cooperatives (ie. those with consolidated gross revenue of \$200,000 or consolidated gross assets of \$500,000) must lodge annual reports as required in the other jurisdictions. Small cooperatives do not have to lodge annual financial statements unless required by the Registrar or by members.

The content requirements for the financial report in all jurisdictions are based on the *Corporations Act* and are therefore very similar to the ACNC requirements. The financial report must include a financial statement prepared in accordance with AASB requirements; notes to the financial statements; directors' reports and consolidated statements if the cooperative is a parent entity. Currently there is no specific requirement for a declaration by a director or other officer in the terms required by the ACNC Act. The CNL will have a requirement in section 275 that the financial statements and notes for a financial year must give a true and fair view of:

- (a) the financial position and performance of the co-operative; and
- (b) if consolidated financial statements are required-the financial position and performance of the consolidated entity.

Currently, financial reports must be audited by a registered company auditor.

Under the proposed CNL, cooperatives will be categorised as small (see above) or large (see above). The proposal is that small cooperatives will only be required to submit a simple Annual Return and large cooperatives will be required to lodge an Annual Return with financial statements, similar to current requirements.

Fees for lodging annual returns are set out below:

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<sup>95</sup> Small co-operatives in Western Australia are required to lodge an annual return but in a simplified form without financial reports.

<b>VIC</b>	\$50.10 – \$ 62.70
<b>SA</b>	\$81 – \$246
<b>NT</b>	NIL
<b>Tas</b>	\$72
<b>NSW</b>	Nil – on time; \$107 – less than 28 days late; \$219 – 28 days or more late
<b>WA</b>	No fee as Annual Return not required
<b>QLD</b>	Nil – on time; \$75 – less than 28 days late; \$300 – 28 days or more late
<b>ACT</b>	Not available

As noted above, the ACNC financial reporting requirements apply to entities with revenue of more than \$250,000. This will require additional preparation and lodgement of financial reports by ND cooperatives. The content and auditing requirements of the ACNC Act are almost identical to those of the States and Territories (other than the declaration by the Responsible Entity). The report prepared for the State or Territory regulator may be used for the ACNC (or vice versa) with minor modifications. However, the need to prepare two separate reports and to ensure that all requirements are satisfied will result in duplication and additional compliance costs as follows:

- External advice to comply with both sets of requirements (annually). This may be offset if the financial report is prepared and either reviewed or audited to comply with the ACNC requirements and this also meets the requirements of the State or Territory.
- Additional lodgement will require administrative action/external advice (annually).

### **Charitable Trusts**

There are no statutory requirements for financial reporting imposed on charitable trusts by the States or Territories. A corporate trustee will be subject to the *Corporations Act*.

Although there will be additional reporting requirements for charitable trusts with revenue of more than \$250,000 in relation to the AFS, this will not result in any duplication as the States and Territories do not require charitable trusts to report.

## **Unincorporated Associations and other bodies**

There are no statutory financial reporting requirements imposed on unincorporated associations or other bodies by the States or Territories.

Although there will be additional financial reporting obligations for unincorporated associations and other bodies (except basic religious charities) with revenue of more than \$250,000 in relation to the AFS, this will not result in any duplication as the States and Territories do not require these charities to report.

# APPENDIX J - DETAILED IMPACT OF OTHER REPORTING REQUIREMENTS

## NOTIFYING CHANGE OF PARTICULARS

### Incorporated associations

In the States and Territories some changes must be notified to the Regulator.

- **Victoria** requires changes relating to address, secretary, committee members, association name and alteration of rules to be notified. For an application to change the association name the fee is \$25.10; to alter the rules the reduced fee of \$75.20 applies until 26 November 2013; to change both the name and alter the rules the fee is \$100.30 until 26 November 2013. If applying to adopt the model rules, there is no fee until 26 November 2013.
- **SA** For changing the Constitution / lodging a new Constitution, or for a change to name of the association, the fee is \$58.00 (additional fees apply for late lodgement).
- **NT** For an amendment to the Constitution or appointment of a public officer or change of address: \$15 If lodged within 1 month, \$36 if lodged after 1 month;
- **Tas** For an application to change the rules or to change the association's name – there is no fee;
- **NSW** For an application for approval of a change of the association's name \$57; for an application for approval of a change of association's objects or constitution \$43.
- **WA** For changing the rules, name or objects, the following fees apply: \$22.10 (for change of rules only); \$44.20 (changes to the name OR objects) \$66.30 (changes to the name and objects)
- **QLD** For an application for registration of a change of name: \$64.00; for an application for amalgamation of incorporated associations: \$129.00: for an application to register an amendment of rules \$17.00;
- **ACT** For a change of rules or objects of the association: \$36 if lodged within one month of date of change, otherwise \$69.00; for an application for change of the association's name: \$36.00.

Generally the requirements to notify relate to change of name or responsible officer or change to the constitution. If such a change occurs the incorporated association will be required to lodge the information with both the applicable State or Territory authority and the ACNC (duplicated requirements). Additional lodgement will require administrative action (as required).

There will be no duplication of fees as the ACNC does not impose fees for lodgement of documents.

## Cooperatives

Each State and Territory has requirements to notify change of name or responsible officer or a change to the constitution.

VIC	\$18.80 per rule (to max \$188.00)
SA	\$12.90 per rule (to max \$129.00)
NT	NA
TAS	\$14.40 per rule (to max \$144.00) + \$36
NSW	\$17.00 per rule (to max \$146.00)
WA	NA
QLD	\$15.00 per rule (to max \$150.00) + \$37.50
ACT	NA

If such a change occurs the ND cooperative will be required to lodge the information with both the applicable State or Territory authority and the ACNC resulting in duplication.

Additional lodgement will require administrative action.

There will be no duplication of fees as the ACNC does not impose fees for lodgement of documents.

### **Unincorporated Associations, charitable trusts and other bodies**

There are no State and Territory statutory requirements in relation to unincorporated associations, charitable trusts or other bodies to notify changes of particulars. No duplication arises.

## **ADDITIONAL REPORTING REQUIREMENTS**

- 170.** The ACNC Act provides for the Commissioner to require additional reporting by particular charities or by particular categories of charities. This is likely to be

relevant only where there is reason to believe that a registered entity has contravened the ACNC Act.

- 171. Incorporated associations** – Some States and Territories have provisions in the incorporated associations legislation requiring additional information<sup>96</sup> but, as noted, use of such provisions is infrequent and consequently duplication results in a minor compliance burden.
- 172. Cooperatives** - There are no provisions that provide for additional reporting and so no duplication.
- 173. Unincorporated associations, charitable trusts and other bodies** – there is no State and Territory legislation for reporting by these entities, so there is no duplication for these types of charities.

## **GROUP REPORTING**

- 174.** The ACNC Act permits groups of entities to prepare a group financial report.
- 175. Incorporated associations** – The States and Territories have no equivalent provisions in the incorporated associations legislation permitting group reporting.
- 176. Cooperatives** – Under State and Territory legislation cooperatives can prepare a combined report for a consolidated group. The consolidated group is defined in the *Corporations Act 2001*: members of the group must be wholly owned by a head/parent company. This arrangement is more likely to occur with distributing cooperatives. If groups of cooperatives are charities, some duplication occurs but the arrangement is concessional and will not add to the burden of reporting.
- 177. Unincorporated associations, charitable trusts and other bodies** – there is no State and Territory legislation for reporting by these entities, so there is no duplication for these types of charities.

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<sup>96</sup> NSW s 51, Vic s 93(1)(b), QLD s 119A, NT s 94.

# APPENDIX K – DETAIL OF IMPACT ANALYSIS

## OVERALL APPROACH AND METHODOLOGY

The overall aim of this impact analysis is to estimate the costs of regulatory duplication arising from each of the options.

The indicative regulatory duplication cost estimates are based on information provided by the COAG NFP Reform Working Group (NRWG), including:

- Mapping of the existing regulatory requirements of the States and Territories against the proposed Commonwealth governance and reporting requirements in the draft ACNC regulations
- Australian Taxation Office (ATO) data on the number of charities covered by the draft ACNC regulations
- Commentary on the identified regulatory burden and duplication between the existing and proposed governance and reporting requirements.

Where possible, DAE has attempted to quantify estimates of these regulatory duplication costs in accordance with the COAG RIS processes. These estimates are not statistically significant. To be able to quantify estimates of regulatory duplication costs, key variables that fed into the estimate and were either provided by NRWG or developed by DAE through brief consultations with NFP organisations, legal and financial professionals are:

- Differences between existing regulatory requirements of States and Territories and the proposed ACNC governance and reporting requirements and an estimate of the nature and extent of these differences
- An indicative estimate of the proportion of charities affected by each difference between the existing and proposed regulatory requirements
- An estimate of additional time taken per charity to comply with each regulatory requirement for which the existing and proposed requirements differ (and whether these costs are incurred per annum or once-off)
- Non-labour-based regulatory duplication costs such as the purchase of legal or financial advice or lodgement fees to comply with each regulatory requirement for which the existing and proposed requirements differ.

DAE notes that the following issues impact the accuracy of the regulatory duplication estimates:

- States and Territories have expressed concern with the accuracy of the ATO data on the number of charities covered by the draft ACNC regulations. In particular, doubts arise about the accuracy of some of the data due to the self-reporting of entity type.<sup>97</sup> In addition, DAE has made a number of assumptions to incorporate the ATO data into the proposed ACNC entity tiers (see DAE's calculation methodology below).
- Although the governance standards are not meant to be prescriptive, many of the steps and activities needed to meet the proposed ACNC regulatory requirements are still undefined as guidance material

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<sup>97</sup> For example, Western Australia has noted that it understands in practice there are few if any charitable cooperatives in the State, while the ATO data indicates there are 22 charitable cooperatives in Western Australia.

has not yet been prepared. Until the proposed regulatory requirements are further defined (e.g. what constitute reasonable steps to ensure that a charity's responsible entities comply with the various duties) and the level of assistance provided by the ACNC to charities (e.g. the provision of checklists, templates etc.), the expected regulatory duplication activities for charities are assumed in the RIA and may need to be revised once further detail and certainty is established.

- The proportion of charities affected by each area of duplication is assumed by Treasury and these assumptions have been quantified by DAE. Again, these assumptions may need to be revised once the consultation RIA is released and further consultation is undertaken.
- The marginal impact of the proposed ACNC requirements will depend on the business-as-usual (BAU) operations of each charity.

## ENTITY NUMBERS CALCULATION

The Department of Treasury provided DAE with ATO data on the number of charities by entity type and by State and Territory. As noted above, some States and Territories have expressed concern with the accuracy of this data. The ATO data categorises charities by revenue size, but not using the proposed ACNC entity tiers and a number of charities were categorised as having a revenue 'not stated or no ABN'. DAE made the following assumptions to incorporate all charities into the proposed ACNC entity tiers:

- For entities with revenue of \$0 to \$100,000, these were reclassified as 'small entities'
- For entities with revenue of \$100,000 to \$1,000,000, 55% of these were reclassified as 'small entities' and 45% were reclassified as 'medium entities'<sup>98</sup>
- For entities with revenue of \$1,000,000 and over, these were reclassified as 'large entities'
- For entities with revenue 'not stated/ no ABN', these were reclassified into the proposed ACNC entity tiers (small, medium and large) by the same proportions as other revenue size groups for that entity type in each jurisdiction. For example, if a State or Territory had 100 cooperatives made up of 70 reclassified small entities (70%), 20 reclassified medium entities (20%) and 10 reclassified large entities (10%), and it had another 10 entities whose size was 'not stated/ no ABN', these extra 10 were reclassified into 7 small entities, 2 medium entities and 1 large entity.

## IMPACT COSTING FOR OPTION 1

DAE then developed costing for Option 1 (no action to address regulatory duplication following establishment of the ACNC, where each jurisdiction proceeds with regulation of the NFP sector to the extent of its constitutional power).

The costing has been developed per each proposed ACNC requirement, per entity type and per entity size where appropriate, and involved the following steps:

1. **Understanding and interpreting the proposed ACNC requirements** – NRWG provided DAE with commentary on the proposed ACNC requirements and worked with DAE to understand the practical implications of these requirements on charities.

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<sup>98</sup> These values were calculated to ensure small entities as a proportion of total entities was 78% (as reported by the ATO).



2. **Mapping current State and Territory requirements** – NRWG mapped the existing State and Territory requirements against each of the proposed ACNC requirements. DAE used this mapping to determine which States and Territories are most likely to be affected by each proposed ACNC requirement.
3. **Identifying marginal burden at a practical level for charities** – DAE worked with the University Consultants to consider each proposed ACNC requirement in detail and for each:
  - What activities and/or changes charities would need to make to existing systems or to report to comply with the requirement (these changes included administrative/operational action, reporting to a regulator and paying regulator fees and obtaining legal and financial advice)
  - The proportion of each entity type that would need to make the change or report (for eg. some charities within an entity type may be closer to complying with the proposed ACNC requirements than others)
  - Estimating the frequency of regulatory duplication (one-off or ongoing on an annual basis).
4. **Estimating the cost of the marginal burden** – DAE then estimated this marginal burden using a number of information sources:
  - Charity time (administrative and operational, including administrative staff time but not Board members' time) – these estimates were based on brief consultations with a number of NFP organisations, discussions with Treasury and DAE staff
  - Regulator fees – these estimates are based on State and Territory regulator fees (such as for notifying of changes and lodging annual returns) collected by Treasury and provided to DAE
  - Legal/accounting services – these estimates are based on consultations with several legal practitioners from a number of States and Territories and with DAE staff that provide accounting and auditing services to NFP organisations.

### **Summarising the key areas of regulatory duplication under Option 1**

DAE has assessed the marginal cost of regulatory duplication across the 12 ACNC requirements, 8 State and Territories and 5 entity types, using the methodology set out above.

This marginal cost is summarised in Table 2 below.

Apart from Victoria which has less expected duplication burden than the other States and Territories,<sup>99</sup> there do not appear to be significant differences between the current State and Territory requirements in areas of regulatory duplication (although the numbers of charities in each entity type and State and Territory will obviously vary and this will affect total regulatory duplication burden estimates). For this reason, the marginal cost is presented below by:





- Proposed ACNC requirement; and

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





















































<sup>99</sup> This is mainly due to Victoria having already started to align its regulatory framework with the *Corporations Act 2001* (for example in aligning its entity tiers, having relevant duties expressly imposed by the *Associations Incorporation Reform Act 2012* etc.).

- Entity type.

Burden is indicated by coloured 'traffic lights', with:

-  Red indicating greatest regulatory duplication burden (change to existing systems or multiple reporting is required for charities);
-  Yellow indicating where a Standard does not apply to an entity type
-  Green indicating no burden (no change is required)
-  Black indicating new or additional requirements for charities. Please note that as these are not regulatory duplication between the Commonwealth and States and Territory regulators, they have been identified but not costed. Nevertheless, these new and additional requirements will result in additional costs for charities.

**TABLE 2**

	Incorporated associations	Trusts	Unincorporated associations	Cooperatives	Other bodies
Standard 1: Governing rules					
Standard 2: Accountability to members					
Standard 3: Compliance with Australian Law					
Standard 4: Responsible management of financial affairs					
Standard 5: Suitability of responsible entities					
Standard 6: Duties of responsible entities					
Entity tiers					
Annual Information Statement					
Annual Financial Statement					
Notifying ACNC of changes					
Additional reporting					
Group reporting					

## COST ASSUMPTIONS FOR ESTIMATING THE REGULATORY DUPLICATION UNDER OPTION 1

**TABLE 3: Lodgement fees for incorporated associations and cooperatives**

		ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<b>Incorporated associations</b>									
Lodgement fee for change of rules, constitution, objects etc.	All sizes	\$36	\$43	\$15	\$17	\$58	No fee	\$75*	\$44
Lodgement of annual report (lodgement assumed to be on time)	Medium	\$36	NIL	\$15	\$45	\$81	\$58	\$100	Lodgement not required
	Large	\$36	NIL	\$15	\$45	\$81	\$58	\$201	Lodgement not required
<b>Cooperatives</b>									
Lodgement fee for change of rules, constitution, objects etc.	All sizes	\$36	\$43	\$15	\$112.50 ****	\$58	\$50.4**	\$103***	\$35
Lodgement of annual report (lodgement assumed to be on time)	Medium	\$36	\$51	\$15	\$0	\$81	\$72	\$41.25	\$35
	Large	\$36	\$51	\$15	\$0	\$81	\$72	\$41.25	\$35

\* Please note the \$75 fee for change of rules is an interim fee only and applies until 26 November 2013. After this time the fee increase to \$156.60.

\*\*This cost estimate assumes only 10% of the rules has been changed and includes the cost of an application to Commissioner for approval of alteration to rules and an application for registration of rule alteration.

\*\*\* This cost estimate takes a mid-point of the fees payable under the Victorian Cooperatives Regulations 2008.

\*\*\*\* This cost estimate takes a mid-point of the fees payable under the Queensland Cooperatives Regulation 1997.

**TABLE 4: OTHER COST ASSUMPTIONS (ALL STATES AND TERRITORIES)**

<b>Amend existing constitution and legal advice (Duties)</b>	All sizes	\$3000 (the mid-point has been taken between \$1,000 to \$5000)
<b>Amendment of existing financial report to include info required by ACNC</b>	Medium	\$1,000
	Large	\$1,000
<b>Review</b>	Medium	\$3,500
<b>Audit</b>	Medium	\$5,000
	Large	\$30,000
<b>Hourly rate for admin staff<sup>100</sup></b>	All sizes	\$18.50
<b>Number of years costed for ongoing costs</b>	All sizes	5
<b>Number of hours per day</b>	All sizes	7.5

Please note: these cost assumptions are initial estimates and while they do take into account an entity's size (except for the amendment of existing financial report), they do not take into account differences of entity type or the State or Territory in which an entity is located. For example, incorporated associations that are charities in WA may or may not be licensed for fundraising and the financial reporting requirements for licensed charities in WA are more onerous, and closer to the ACNC requirements for medium and large registered entities than that applicable for non-licensed charities. As such, the cost burden to amend existing, or develop new, financial reports will be greater on incorporated associations in WA that are not licensed charities in WA.

It should also be noted that the external advice/services estimated above may be provided on a pro-bono basis for some charities. Where this occurs, costs of duplication may be shifted from the NFP sector to the private sector (presumed to be providing the pro-bono services).

Sources: Cost estimates for constitution amendments are from consultation with lawyers; cost estimates for financial report amendments and audit/review are from consultation with accountants; hourly rate for administrative staff (currently applied in cost estimate) is from consultation with economists.

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<sup>100</sup> Admin staff time has been estimated and costed for all steps/activities not requiring

**TABLE 5: TIME ASSUMPTIONS**

<b>Duplication compliance activity (all sizes, all entity types)</b>	<b>Estimated days per admin staff (ongoing)</b>
Amend existing constitution (duties)	1 day
Amend existing annual report to meet ACNC AIS requirements	1 day
Amend existing financial report to meet ACNC AFS requirements	0.25 days to manage process (external advice assumed and costed, see above)
Engagement of auditor or reviewer	0.5 days to manage process (external advice assumed and costed, see above)
Additional lodgement requirements for cooperatives to meet ACNC AIS or AFS requirements	0.1 days

Please also note, Board time has been identified and estimated for duplication compliance activities; however no cost has been attached to this time as it is assumed to be unpaid, volunteer time.

**TABLE 6: TOTAL ESTIMATED REGULATORY DUPLICATION BURDEN UNDER OPTION 1**

The table below presents an estimate of the compliance burden that arises from the duplication between existing regulatory requirements of States and Territories and the proposed ACNC governance and reporting requirements. This estimate of regulatory duplication costs relates to estimated costs incurred by incorporated associations and cooperatives and on a per-annum and/or once-off basis.

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	National
<b>One-off costs</b>									
<i>Incorporated associations</i>	\$59,889	\$532,989	\$52,304	\$348,758	\$273,402	\$83,463	\$-	\$297,537	\$1,648,343
<i>Cooperatives</i>	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-	\$-
<i>One-off costs (subtotal)</i>	\$59,889	\$532,989	\$52,304	\$348,758	\$273,402	\$83,463	\$-	\$297,537	\$1,648,343
<b>Ongoing costs (per year)</b>									
<i>Incorporated associations</i>	\$336,772	\$1,509,527	\$122,978	\$933,419	\$1,282,639	\$210,522	\$1,256,642	\$7,643,190	\$13,295,690
<i>Cooperatives</i>	\$617	\$32,139	\$418	\$11,777	\$5,889	\$1,915	\$36,853	\$4,690	\$94,296
<i>Ongoing costs (subtotal)</i>	\$337,389	\$1,541,666	\$123,396	\$945,196	\$1,288,528	\$212,438	\$1,293,495	\$7,647,880	\$13,389,986
<b>Total*</b>	<b>\$397,277</b>	<b>\$2,074,655</b>	<b>\$175,700</b>	<b>\$1,293,953</b>	<b>\$1,561,930</b>	<b>\$295,901</b>	<b>\$1,293,495</b>	<b>\$7,945,417</b>	<b>\$15,038,329</b>
One-off per entity (all sizes)**	\$112	\$76	\$159	\$89	\$123	\$121	\$-	\$101	
Ongoing per entity (all sizes) **	\$633	\$221	\$377	\$241	\$583	\$310	\$261	\$2,600	

\* Costs incurred in the first year.

\*\* This figure indicates the difference in cost per entity between States and Territories (which have different numbers of charities). It does not take into account the significant variation between entity type and size.

**TABLE 7: PERCENTAGE OF CHARITIES AFFECTED BY REGULATORY DUPLICATION**

ACNC requirement	Entity type	Entity size	Type of compliance activity	Proportion of entity type affected (best estimate)
Standard 6: Duties of responsible entities	Incorporated associations	Small	Amendment of current systems to ensure compliance	0% in all S+T
		Medium	Amendment of current systems to ensure compliance	10% in all S+T but Vic
		Large	Amendment of current systems to ensure compliance	20% in all S+T but Vic
Annual Information Statement (Small, medium and large entities)	Cooperatives	All	Amendment of existing annual report to include information required in sections B&C (less effort assumed than the preparation of a completely new AIS)	80%[1]
Annual Financial Statement (medium entities)	Incorporated associations	Medium	Amendment of existing financial report to include information required by ACNC	100%
		Medium	Engagement of auditor to carry out an audit	0% in Vic, Tas, NT, NSW and Qld; 10% in SA and ACT; 20% in WA[2]
		Medium	Engagement of a reviewer to carry out a review	0% in Vic, Tas, NT, NSW and Qld; 40% in SA and ACT; and 80% in WA.
	Cooperatives	Medium	Additional lodgement requirements requiring administrative action and external advice	100%
Annual Financial Statement (large entities)	Incorporated associations	Large	Amendment of existing financial report to include information required by ACNC	100%
		Large	Engagement of auditor to carry out an audit	0% in Vic, Tas, NT, Qld, NSW, SA and ACT; 34% of entities in WA[3]
		Large	Additional lodgement requirements requiring administrative action and external advice	100%

Notes: [1] We have assumed some (80%) cooperatives will already have an existing annual report which they can amend to meet ANCN requirements; while others (20%) will need to prepare a completely new AIS. [2] As per the RIA; for incorporated associations, in Victoria medium entities must be reviewed; in SA prescribed associations must be audited (Deloitte has assumed 50% of charities are prescribed); in Tas all entities must be audited (although an exemption can be sought in certain circumstances); in NT all entities must be audited; in Qld medium entities must be reviewed; in NSW 'medium' entities are already audited and WA medium entities do not need to be reviewed or audited; in ACT non-prescribed associations must be audited (Deloitte assumes 50%). Deloitte has also assumed that given the choice of a review or audit, 80% of charities would choose to conduct a review and 20% would choose an audit. [3] As per the RIA; for incorporated associations, in Victoria large entities must be audited; in SA and ACT prescribed associations must be audited (Deloitte has assumed 100% of large associations are prescribed); in Tas all entities must be audited (although an exemption can be sought in certain circumstances); in NT all entities must be audited; in NSW all 'large' entities must be audited; in Qld large entities must be audited and other size entities may be audited (Deloitte assumes 50%); in WA entities do not need to be audited unless they are registered for fundraising (Deloitte understands 1000 out of the 2919 or 34% of all inc ass are in this category, so we assume 66% of large inc ass are not currently audited).



## INDICATIVE ANALYSIS OF OPTIONS

A 'multi-criteria analysis framework'\* has been developed to provide structure to the impact analysis of the options. This considers the compliance burden for charities, ease of implementation and the implications for achieving regulatory objectives. DAE has relied on Treasury (and S+Ts??) for information relating to ease of implementation and the implications for achieving regulatory objectives.

TABLE 6:

Criterion	Definition	Rating scale
Charities' compliance burden	Estimated as the marginal financial cost (fees) and resources cost(time) from regulatory duplication	\$ estimate
Ease of implementation (including administrative costs of implementation)	Qualitative assessment of the likely implementation requirements and costs (to all governments) – in particular the extent of legislative change required and hence time required for option to be implemented	ST – implementation could occur in short term MT – implementation could occur in medium term LT – implementation could occur in longer term NF – not feasible
Impact on revenues collected	Qualitative assessment of the likely impact on revenues collected by S+T governments from fees.	Qualitative discussion
Impact on administrative costs of ongoing regulatory activity	Qualitative assessment of the likely impact on administrative costs for S+T governments of ongoing regulatory activity.	Qualitative discussion

## INITIAL ANALYSIS OF OPTIONS AND EXPECTED CHANGE TO DUPLICATION BURDEN

With the exception of Option 4 (see case study on SA below), it is not possible to reliably estimate the financial cost on charities of Options 2 to 5 because of the uncertainty of the reduction of duplication that would be achieved and the complexity involved in developing the estimates. The quantitative estimates for Option 1 were based on in-depth mapping of specific legislative and compliance requirements and these estimates could not be replicated for the other options without similarly detailed mapping of the legislative and compliance requirements and an indication of how many States and Territories would adopt the option (in whole or in part). However, the high level definition of the options provides an indication of the likely reduction in duplication achievable and hence a qualitative assessment of the impact of each option is presented below. A key objective of the consultation RIA is to provide stakeholders with the opportunity to input into these estimates.

TABLE 7:

	Option 1	Option 2	Options 3	Option 4A	Option 4B	Option 5
<b>Charities' compliance burden</b>						
<i>Implications of each option on duplication burden</i>	All duplication costs included	S+Ts require same information as ACNC for AIS and AFS	Cth changes ACNC requirements to reflect most common or most cost effective S+Ts  ACNC reduce governing rules (NFP status) to most common/cost effective S+Ts  ACNC require same information as common/cost effective S+Tsfor AIS and AFS	S+Ts require same information as ACNC for AIS and AFS Twice reporting removed (where legislatively required) Lodgement fees removed (assumed legislatively required) S+Ts change legislation to reflect ACNC governing rules requirements (NFP status) S+Ts change legislation to reflect ACNC duties of responsible entities requirements S+Ts change legislation to reflect ACNC entity tiers S+Ts change legislation to require ACNC level of audit/review of financial reports S+Ts change legislation to reflect ACNC additional and group reporting requirements	S+Ts change all relevant legislation to exclude charities from having to comply with the S+Ts legislation wherever an ACNC requirement exists at the Cth level	All duplication costs removed

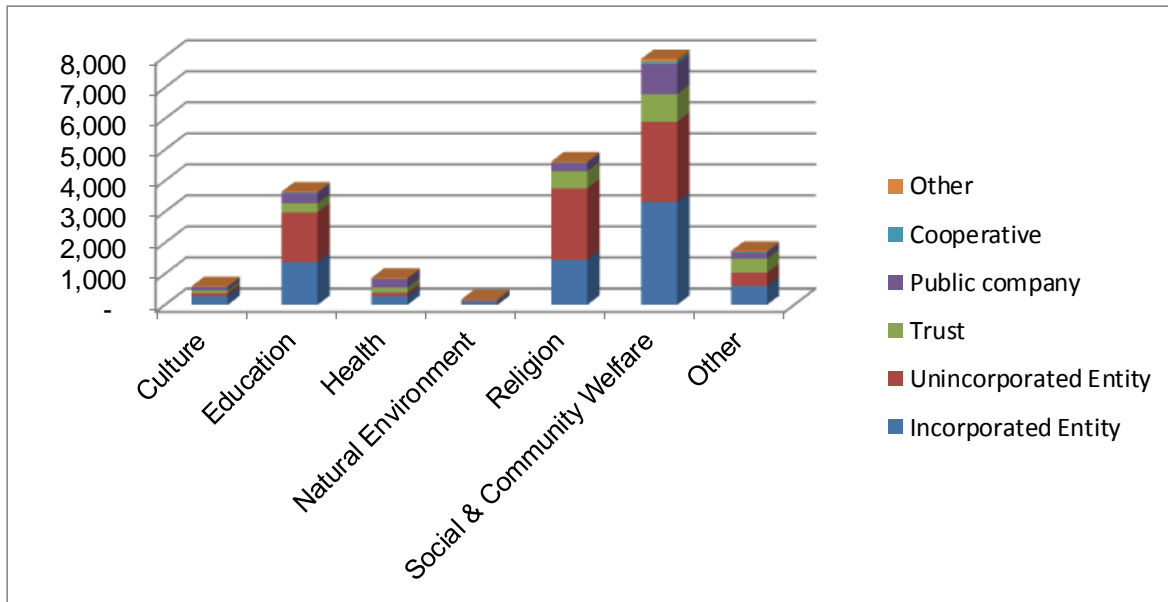
<i>Overall effect on duplication burden</i>	No change	Small reduction	Considerable reduction in common/cost effective S+Ts  No change in non-common/cost effective S+Ts	Large reduction	Large reduction	Large reduction
<b>Major barriers and risks</b>						
<i>Ease of implementation (including administrative costs of implementation)</i>	-	Short Term  Some COAG negotiation required  Some process change required (change of forms, information requirements at S+T level to align with ACNC)  No legislative change required	Medium Term  Considerable work (and COAG negotiation) required to define and agree to most common/effective S+Ts regulatory frameworks  Considerable process and legislative change required by ACNC (compared to the proposed regulations)  Considerable process and legislative change required by the non-common/cost effective S+Ts	Long Term  Considerable COAG negotiation required  Considerable process change required  Considerable legislative change required	Long Term  Considerable COAG negotiation required  Considerable process change required  Considerable legislative change required	Long Term  Considerable COAG negotiation required  Considerable process change required  Considerable legislative change required
<i>Impact on revenues collected</i>		No change in revenues collected by S+Ts as charities still need to report twice	No change in revenues collected by S+Ts as charities still need to report twice	Reduced revenues collected by S+Ts as charities no longer need to report twice.	Reduced revenues collected by S+Ts as charities no longer need to report twice.	Reduced revenues collected by S+Ts as charities no longer need to report twice.

<i>Impact on administrative costs of ongoing regulatory activity</i>		Potential increase in cost of compliance enforcement for S+Ts as they are delegated ACNC responsibility (and may have to report to ACNC on compliance)	No change to cost of compliance enforcement for common/cost effective S+Ts  Potential change to cost of compliance enforcement for non-common/cost effective S+Ts	Reduced cost of compliance enforcement because of referral of responsibility from S+Ts to ACNC	Reduced cost of compliance enforcement because of referral of responsibility from S+Ts to ACNC	Reduced cost of compliance enforcement because of referral of responsibility from S+Ts to ACNC
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## APPENDIX L – CHARITIES AND ENTITY TYPES

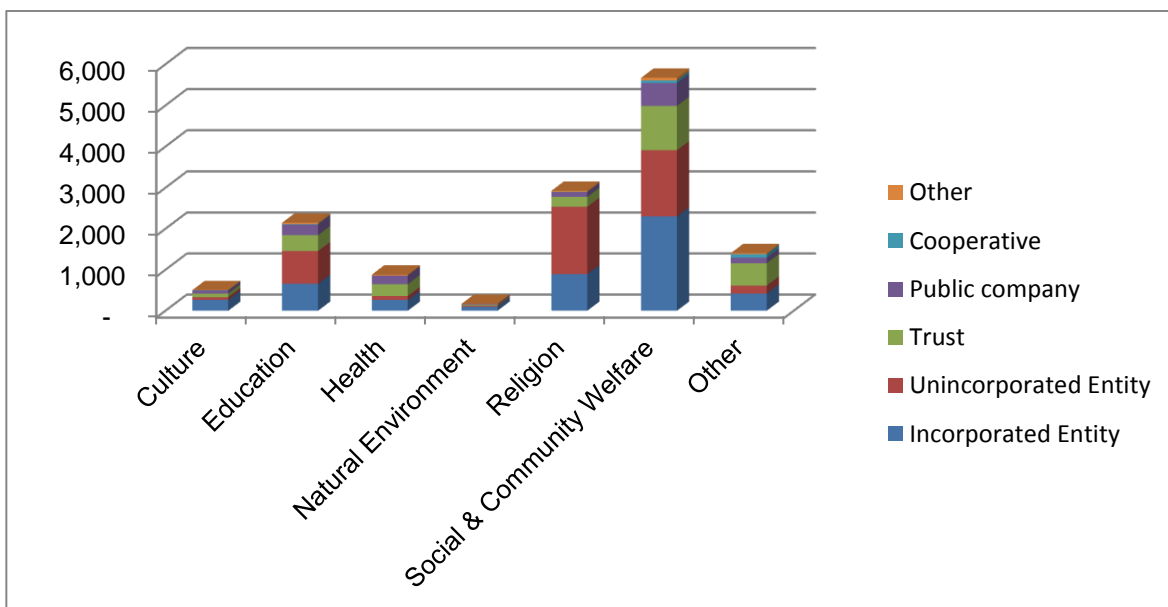
The following charts illustrate, for each State and Territory, the distribution of charities according to their purpose and entity type.

**NEW SOUTH WALES REGISTERED CHARITIES – PURPOSE & ENTITY TYPE**



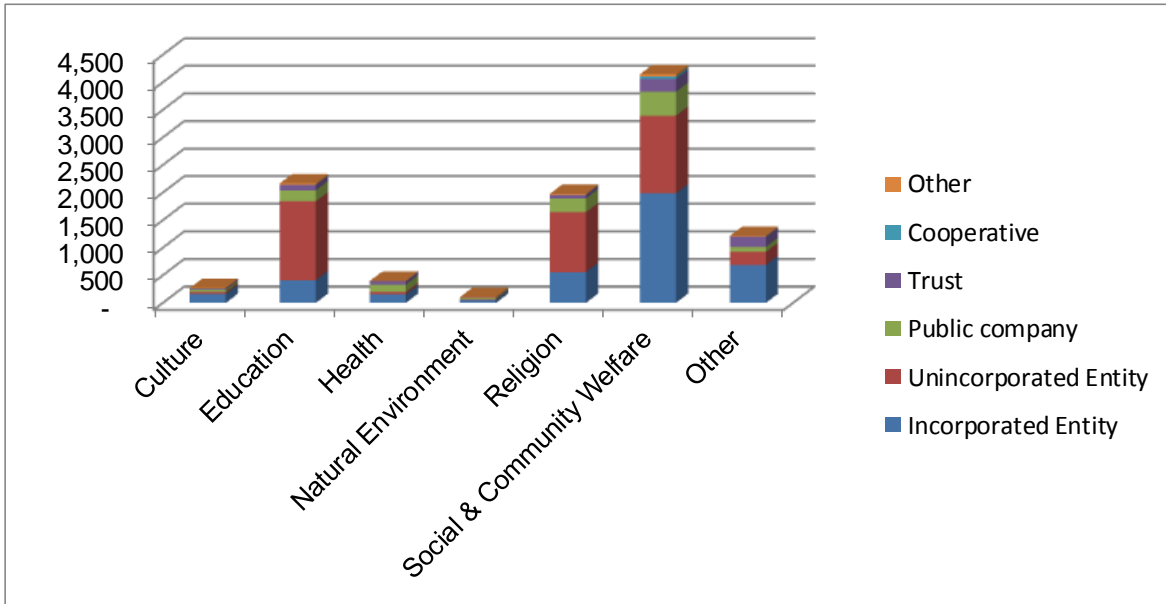
Source: ATO data (not published).

**VICTORIAN REGISTERED CHARITIES – PURPOSE & ENTITY TYPE**



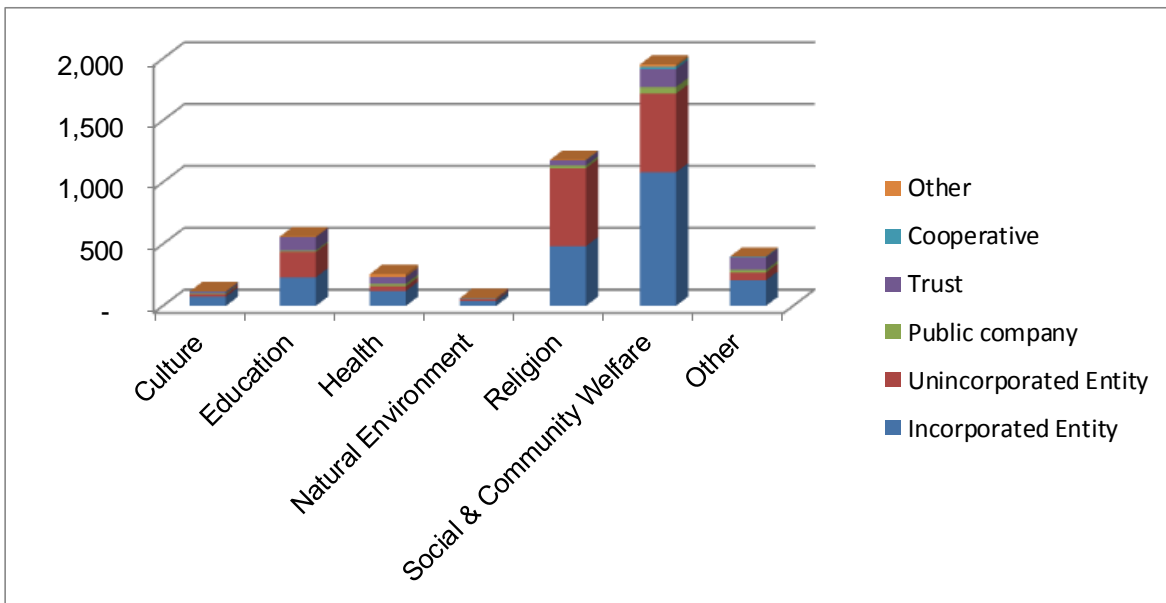
Source: ATO data (not published).

### QUEENSLAND REGISTERED CHARITIES – PURPOSE & ENTITY TYPE



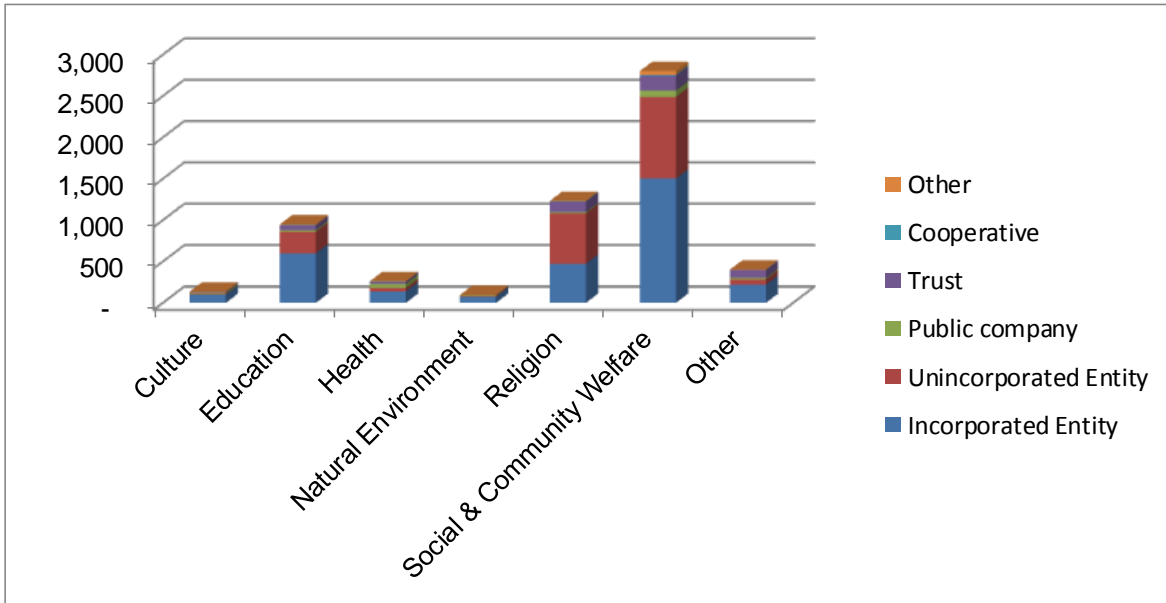
Source: ATO data (not published).

### SOUTH AUSTRALIAN REGISTERED CHARITIES – PURPOSE & ENTITY TYPE



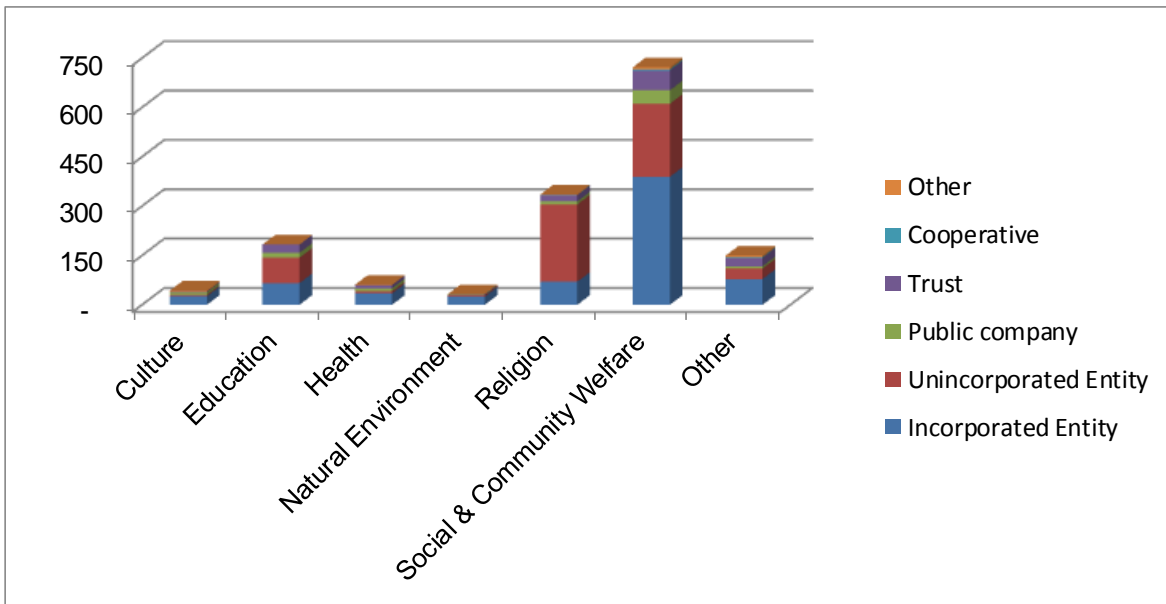
Source: ATO data (not published).

### WEST AUSTRALIAN REGISTERED CHARITIES – PURPOSE & ENTITY TYPE



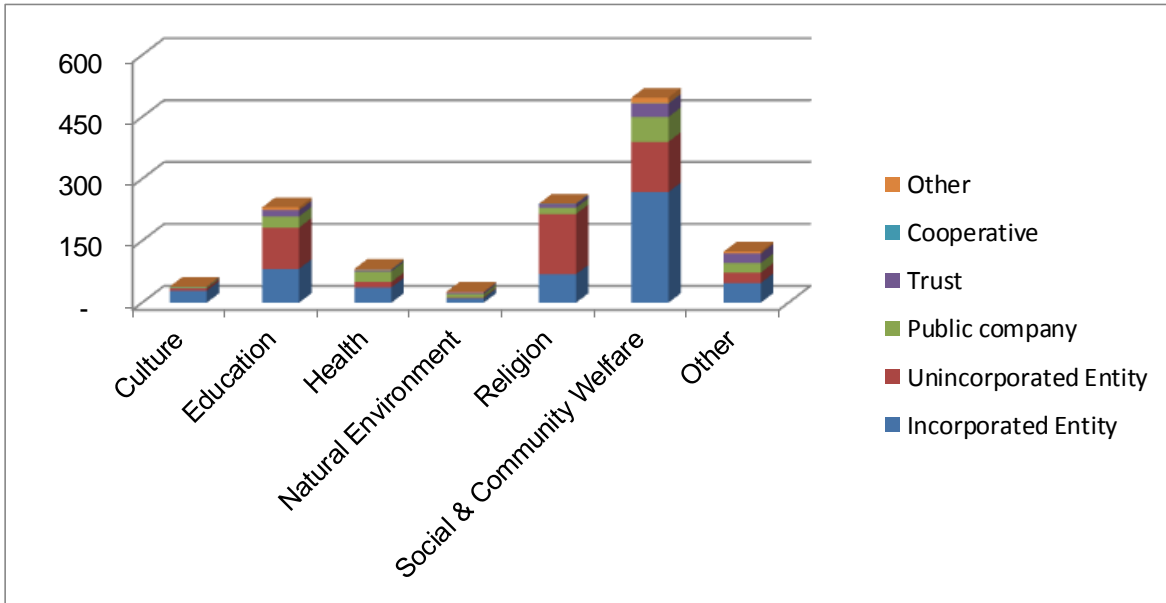
Source: ATO data (not published).

### TASMANIAN REGISTERED CHARITIES – PURPOSE & ENTITY TYPE



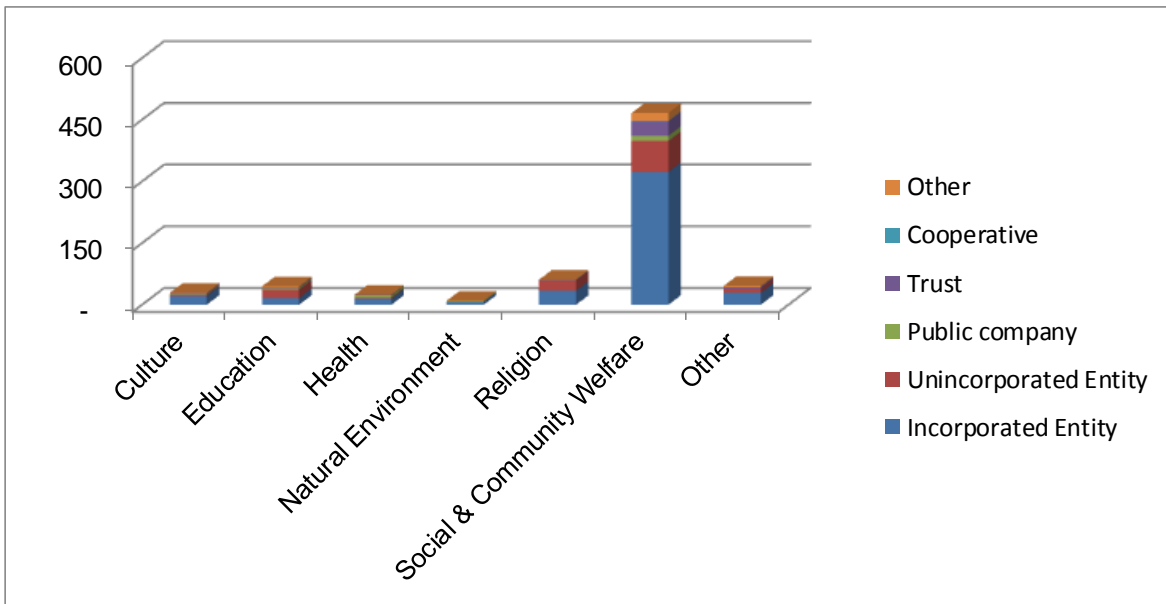
Source: ATO data (not published).

### AUSTRALIAN CAPITAL TERRITORY REGISTERED CHARITIES – PURPOSE & ENTITY TYPE



Source: ATO data (not published).

### NORTHERN TERRITORY REGISTERED CHARITIES – PURPOSE & ENTITY TYPE



Source: ATO data (not published).