Submission to the Senate Economics Legislation Committee on the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014

1 May 2014
Executive Summary

In this submission we suggest that there may be a legislative middle-ground between the current legislation and its repeal. If this option is to be explored we submit that the following possibilities may be a basis for a compromise between these two alternatives:

1. That the Australian Charities and Not-for-profits Commission (ACNC) be retained and its functions be shaped to meet Coalition government priorities, including its primary function moving toward the function of the Coalition’s concept of a Centre of Excellence;

2. That the ACNC continue to determine charity status for tax purposes;

3. That the ACNC continues to be the public repository of information:
   a) That particular charities wish to lodge and make publicly available, and
   b) Such other information as is determined, if any;

4. That the ACNC be the non-public repository of such other information:
   a) As is necessary to be kept for registration purposes (of which the most likely is information regarding tax status)
   b) Such other information as is determined; if any;

5. That to the extent that the regulatory functions of the ACNC legislation do not work at present, or are very difficult to implement given the Federal nature of the Commonwealth, that they be abandoned at this time;

6. That if there is to be regulation at some future time, that regulatory framework be (re)built driven by the sector’s and community concerns, which we suggest begin with fundraising regulation; and,

7. That so far as is possible in this transition process, the goodwill and resources built up over the last two year be built upon, not squandered.
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Submission to the Senate Inquiry regarding the ACNC legislation

We support the continuation of the Australian Charities and Not-for-Profits Commission (ACNC) for a combination of at least the following reasons.

A vibrant civil society

1. The Coalition made it clear before the last election that it intended to abolish the ACNC. Philosophically, it is opposed to government regulation or control of the sector. It has proposed a ‘Centre of Excellence’ which will ultimately, ideally, be controlled by the sector; but at least in the short term, such a Centre would be established by government. It appears that many of the proposed functions of the Centre of Excellence are already being carried out by the ACNC. At the very least, it makes sense to resource the ACNC as the Centre of Excellence, rather than abolish it and start afresh.

2. One of the functions of the ACNC is the cultivation of a vibrant civil society. This is a Coalition goal. The Australian Charities and Not-for-Profits Commission Act 2012 lists three objectives for the ACNC, summarised as follows:
   - public trust and confidence;
   - strong NFP sector; and
   - cutting red tape for the sector.

   Even if stripped of its other purposes, the ACNC could continue to pursue the objective of a strong sector, which is consistent with the Coalition’s philosophical approach.

Registration

3. The registration of entities as charities, at least for the purposes of income tax exemption and DGR status, has to be done somewhere. Many in the sector appear to view the ACNC as the preferred location for this function. There is wide-spread opposition to that function returning to the ATO. The ATO itself, in a submission to the Charities Definition Inquiry in 2001, suggested that the separation of charity status from revenue considerations was important, and that it should not be the entity with that responsibility. The ACNC presently has the role of determining charity status, and it makes sense for this to continue in the immediate future. Many would like it to continue for the next three and half years, after which the legislated review of the ACNC’s effectiveness would take place.
So far as we are aware, the ACNC continuing to perform this function is not contrary philosophically to Coalition policy. If this function is not to continue with the ACNC in the longer term, then the ASIC or other options should be explored. The possible privatisation of ASIC’s registry function\(^1\) may complicate such a discussion. This is a reason for leaving this function with the ACNC in the short term.

## Reporting

4. Some charities want to make financial, governance and other information about themselves public. We submit that it would be a retrograde step, and contrary to Coalition policy, to deny entities that wish to report and disclose in a publicly recognised forum the opportunity to do so, particularly when we as a nation have just paid to set up such a forum in the ACNC.

5. Some entities do not want to report or disclose at all, or would prefer to report or disclose only if the reports are not made public. How much reporting or disclosure is required, and how much must be made public, are two separate matters. We submit that there is room in the debate for concessions by both sides on the amount of information compulsorily collected and the amount of information compulsorily made public. It may be appropriate for information about some types of entities to be collected and publicised, but not others. Contemplative religious orders and small self-help organisations are archetypal examples of entities where publication of information may be of little benefit to the group or to the public.

6. It is beyond the scope of this submission to explore details, but a nuanced example might help. Those opposed to the publication of information about their charity on a website might be willing for the research community to have access to the data on an identity stripped or aggregated basis. Government departments, like Treasury, might similarly be interested in information on the sector as a whole rather than individual entries on a public register. Concessions have already been made to ‘basic religious charities’, and for ‘commercially sensitive’ information. Revisiting the details of both the information collected and the extent to which it is made public, to see if a greater diversity of perspectives can be accommodated, is an option that might be fruitfully explored.

## Regulation

7. Regulation is the most controversial issue from the Coalition’s point of view. The Honourable Kevin Andrews, Minister for Social Services, is on the record as stating that the ACNC has more powers than the ASIC or ATO and that he does not consider that regulation of the

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\(^1\) *The Australian* 14 April 2014 ‘ASIC assets sized up for $1bn sell-off’

sector by the ACNC is appropriate. Others contend that that the ACNC has no more powers than comparable agencies. We submit that whomever is correct is not critical at the coalface of practice, as we have found that enlivening the ACNC’s more coercive powers is a significant challenge.

8. Bill Shorten foreshadowed difficulties with Commonwealth regulation of state based entities in 2011, pointing out that in reality only a ‘handful of entities’ (probably 7,000 of the >600,000 NFPs) were directly subject to federal regulation. For client confidentiality reasons, we cannot disclose details, but in general terms we have experienced significant difficulties in attempting to enliven the ACNC powers to prevent the misapplication of charitable funds in state-based entities.

9. Our submission, based on our experience, is that irrespective of one’s ideological perspective on regulation of the sector, if the current regime does not work or is fraught with complexity, little may be lost at this time by considerable reduction of the ACNC’s regulatory powers. Some of the difficulty is related to the constitutional limitations in the Commonwealth regulating all charities. We recommend that the ACNC be approached for its views on its powers. If the ACNC agrees, even partially, with this assessment, then there may be grounds for reduction or relinquishment of some or all of its regulatory responsibilities at this time.

10. Such a step need not be permanent. An effective national regulatory regime may be able to be rebuilt progressively over time with state co-operation, as occurred with the regulation of corporations. A beginning might be made with a national fundraising regime. The current federated model requires anyone fundraising nationally to comply with multiple State and Territory regimes. This frustrates and inhibits philanthropic endeavour, particularly by smaller entities. It is our understanding that the sector would welcome national uniform regulation of fundraising, and the ACNC would be a logical choice for a national regulator in such a scheme.

Goodwill, good stewardship and the long-term

11. The sector needs stability. If the ACNC is abolished, only for it to be reinstated again when the government changes, enormous damage will be done to the fabric of civil society.

12. If neither side makes any compromises, then the outcome will probably be determined by whether or not the Coalition can garner the necessary support post 1 July 2014 of six of the eight incoming Senators, whose views on this subject are not known. This uncertainty, and a ‘winner-takes-all’ approach, is less than ideal for the sector. It is our submission that it is in the best long term interests of the sector as a whole for concessions to be made by both sides. If the Senate can find a compromise position, from which incremental changes can be developed, rather than for the sector to be tossed from one extreme of significant regulation to the other extreme of no regulation depending upon which side of politics is in government, it will serve well the sector, and more generally our country.
Summary and proposal

In this submission we have suggested that there is reason to explore finding a compromise between the current legislation and its repeal. We have suggested the following possibilities as a basis for exploring options between the two alternatives:

1. That the Australian Charities and Not-for-profits Commission (ACNC) be retained and its functions be shaped to meet Coalition government priorities, including its primary function moving toward the function of the Coalition’s concept of a Centre of Excellence;

2. That the ACNC continue to determine charity status for tax purposes;

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5. That to the extent that the regulatory functions of the ACNC legislation do not work at present, or are very difficult to implement given the Federal nature of the Commonwealth, that they be abandoned at this time;

6. That if there is to be regulation at some future time that that regulatory framework be (re)built based on sector’s and community concerns, which we suggest begin with fundraising regulation; and,

7. That so far as is possible in this process, the goodwill and resources built up over the last two year be built upon, not squandered.

With Compliments

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