

Introduction

Referral of the Bills

- 1.1 On 5 July 2012, the Assistant Treasurer and Minister Assisting for Deregulation, the Hon. David Bradbury MP, referred exposure drafts of the following Bills for inquiry and report:
- the Australian Charities and Not-for-profits Commission Bill 2012; and
 - the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012.
- 1.2 The Minister requested that the committee report by Tuesday, 14 August 2012.

Background on the sector

- 1.3 The not-for-profit sector plays a major role in Australian society. It comprises 600,000 entities that provide services in education, sports, welfare, arts, religion, culture and community well-being. A breakdown of the different types of entities is given on the table on the next page.

Table 1.1 Type and number of NFP entities (2008-09)

Type of entity	Number of NFPs	Number of charities
Unincorporated association	440,000	20,305
Incorporated association	136,000	22,023
Co-operative	1,850	442
Charitable trust	9,000	6,156
Indigenous Corporation	1,855 (estimate)	550
Companies limited by guarantee	12,000	4,894
Other (private companies)		2,030
Total	600,705	56,400

Source Treasury, *Submission 32*, p. 6.

1.4 The sector plays a major role in the Australian dollar-economy:

- total quantifiable Commonwealth tax expenditures in 2010-11 are estimated at \$3.3 billion;
- unquantifiable Commonwealth tax expenditures are of a similar size, mainly comprising income tax exemptions;
- direct government funding to the sector in 2006-07 was approximately \$25.5 billion; and
- total public donations to the sector were approximately \$7.2 billion in 2006-07.¹

1.5 Therefore, excluding where the sector charges a fee for service, it comprises \$40 billion annually. Adding revenues for fee for service brings the sector up to \$100 billion annually.² It contributes five per cent of Australia's GDP and eight per cent of employment.³

1.6 By definition, the sector also engages heavily with volunteers and much of its contribution to Australian society is outside the dollar economy. The estimated value of volunteer time donated to the sector in 2006-07 was \$14.6 billion.⁴

1 Treasury, *Explanatory Materials*, p. 223.

2 Mr David Crosbie, CCA, *Committee Hansard*, Canberra, 27 July 2012, p. 1.

3 Mr Paul Ronalds, DPMC, *Committee Hansard*, Canberra, 26 July 2012, p. 1.

4 Treasury, *Explanatory Materials*, p. 224.

Rationale for the Bills

Burdensome regulation

- 1.7 The current regulatory framework for the sector is fragmented, inconsistent, and uncoordinated across a range of government agencies. It meets neither the sector's needs nor that of the wider community. For example, a large charity limited by guarantee would provide general reports to ASIC. It would then provide individual reports to each government agency from which it received grants and contracts, which can involve substantial audit fees. It would also provide reports to the State and Territory regulators in the jurisdictions in which it was operating.⁵ In evidence, ACOSS argued that these burdens arose because the system developed in an ad hoc manner.⁶
- 1.8 Of the 600,000 entities in the sector, approximately 440,000 of these are unincorporated organisations that fall outside the sector's regulatory framework. They do not have reporting obligations and cannot be endorsed as charities, but they can self-assess for income tax exemptions.
- 1.9 Around 136,000 entities are incorporated associations under State and Territory legislation. Regulatory practices in these jurisdictions have been criticised for:
- inadequate information for selecting the best form of incorporation;
 - compliance costs that are not proportionate to risk; and
 - passive oversight by regulators.
- 1.10 In general, the sector is characterised by:
- larger entities being subject to excessive regulation;
 - smaller entities tending not to be properly supervised;
 - no agency overseeing the sector's performance and activities;
 - no agency collecting information to inform policy;
 - unnecessary compliance costs with duplicated reporting, especially in the acquittal of grants; and

5 Treasury, *Explanatory Materials*, p. 223.

6 Dr Cassandra Goldie, ACOSS, *Committee Hansard*, Canberra, 26 July 2012, p. 35.

- in rare cases, poor governance practices affecting public confidence and participation in the sector.⁷

1.11 The Community Council of Australia summarised the sector's compliance burden as follows:

The current situation is bizarre, but we have adapted to it. Because we have adapted to it, we kind of accept it. Whenever a not-for-profit wants to engage with any level of government – whether it is hiring a school hall or a local council hall, looking at their rate exemption, trying to get a payroll tax exemption, trying to register for fundraising or trying to apply for a grant from a trust or a government agency – they have to establish their bona fides. They have to say who they are and establish their charitable status. The idea that that has to be done over and over and over again is ridiculous.⁸

1.12 Five major reviews have been conducted into regulation and taxation of the sector since 2000. These were:

- the report of the inquiry into the Definition of Charities and Related Organisations (2001);
- the Senate Economics Committee inquiry into Disclosure Regimes for Charities and NFP Organisations (2008);
- the Australia's Future Tax System report (2009);
- the Productivity Commission report on Contribution of the Not-for-Profit sector (2010); and
- the Senate Economic Legislation Committee inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010 (2010).

1.13 These reviews concluded that the sector's regulatory framework has added to its complexity and costs. They recommended that a single, national regulator for the sector should be established.⁹

1.14 Establishing a specific regulator for the sector would bring Australia into line with other jurisdictions such as the United Kingdom, Canada, and New Zealand. One point that came out of the hearings is that the current proposals have had a long term development and did not arise because of

7 Treasury, *Explanatory Materials*, pp. 225-32.

8 Mr David Crosbie, CCA, *Committee Hansard*, Canberra, 27 July 2012, p. 1.

9 Treasury, *Explanatory Materials*, pp. 224-32.

a crisis within the sector, although this may have been the case overseas. Treasury stated:

... if we have reference to what has happened in international jurisdictions, most of the charities commissions that they have all now established were usually in response to some significant breach of public confidence. So there has been a problem that governments have then sought to resolve. And usually, of course, when problems are there you resolve them in a relatively heavy-handed sort of way. The sector's aim in this particular instance is to be a bit proactive in this and establish a regulatory framework to prevent such an occurrence happening in the first place in Australia.¹⁰

Sustainability of the sector

- 1.15 The committee received evidence that, although the sector has been growing, this has been matched by an increase in community expectations about its operation standards. In particular, organisations are now expected to discuss their work in terms of effectiveness, or outcomes, rather than describing what they do, or their outputs. The Department of Prime Minister and Cabinet expanded on this at the hearing:

I think if we look at the sector very broadly we see that over the last couple of decades there has been very significant growth in the size and scale of many not-for-profits. We have seen very significant increases in community expectations. So really, once upon a time, good intentions, if you like, were good enough. I think that is not the case anymore, that the public is saying much more broadly, 'Show me the results. Demonstrate to me the good that you do,' as they are asking that of a number of other actors in society. I think we have seen a real growing of sophistication of the business model, if you like to use that term, of not-for-profits ...

I think there is significantly increased demand for showing not just what your outputs are but what your outcomes are and then what your return, if you like, on investment is ... I think a lot of not-for-profits are grappling with that. That is one of the issues that is a broader context for the sorts of reforms we are talking about.¹¹

- 1.16 The committee acknowledges that encouraging an outcomes culture in charities and not-for-profits is a broad, long term process that needs to

¹⁰ Mr Chris Leggett, Treasury, *Committee Hansard*, Canberra, 26 July 2012, p. 9.

¹¹ Mr Paul Ronalds, DPMC, *Committee Hansard*, Canberra, 26 July 2012, pp. 6-7.

occur across many aspects of government. The Bills are part of creating a general environment that is conducive to this approach through reduced red tape, more graduated enforcement powers, and being able to disperse more meaningful information about the sector.

Independent from the ATO

- 1.17 During the hearing, the committee heard that retaining the regulatory function within the ATO would not have the support of the sector because of a perceived conflict of interest in that the ATO would be acting as both a revenue raiser and regulator.¹² Another criticism of how the ATO has operated in relation to the sector is that its decisions have been perceived as inconsistent. The Not-for-profit sector Reform Council stated in evidence:

I often hear it as I go round the country. Since I have been chair, I have attended 30 or 40 different functions across Australia, and people do raise that with me – that they can point to a similar organisation that received charitable status or PBI status where they could not, and they maintain that whether you get the endorsement or not depends on which office of the ATO handles your case. They see that having an independent body determining that in an objective manner will certainly be a great improvement on the current circumstances.¹³

- 1.18 The Commission's Implementation Taskforce gave a commitment to the committee that it would ensure its decisions were consistent, which included placing its registration team in one location:

The ACNC will determine the charitable status, the PBI status and the health promotion charity status, according, at this stage, to the common law. In due course we may have a statutory definition of charity and then we will determine that in accordance with the statutory definition. We will have our registration team together in one place. We anticipate a high degree of consistency and we will give reasons for both approving and declining to register that status. That will also contribute to consistency, understanding and transparency as to how we make our decisions.¹⁴

12 For example, Ms Tanya Fletcher, World Vision Australia, *Committee Hansard*, Canberra, 27 July 2012, p. 2; Mr Paul Ronalds, DPMC, *Committee Hansard*, Canberra, 26 July 2012, p. 9; Ms Linda Lavarch, NSRC, *Committee Hansard*, Canberra, 26 July 2012, p. 20.

13 Ms Linda Lavarch, NSRC, *Committee Hansard*, Canberra, 26 July 2012, p. 20.

14 Mr Murray Baird, ACNCIT, *Committee Hansard*, Canberra, 27 July 2012, p. 33.

- 1.19 Often, regulatory agencies are created as wholly separate entities within government. The Government considered a number of options in how it would establish a charities regulator, ultimately making a choice between two alternatives.
- 1.20 The first was to establish an independent statutory office regulator that is not an agency under the *Financial Management and Accountability Act 1997*. This is represented in the Bills. It provides substantial efficiencies to the sector, as well as leveraging off the expertise of the ATO by employing its staff. This was costed at \$53.6 million over the forward estimates.
- 1.21 The other main option was to create a fully independent agency under the *Financial Management and Accountability Act 1997*. Although this would also provide substantial benefits to the sector, it represented more legislative risk, would not access ATO expertise as easily, and would be significantly more expensive. It was costed at \$170 million over the forward estimates.
- 1.22 The Government concluded that the first option, a statutorily independent regulator, accessing the skills and expertise of the ATO, would soon provide substantial benefits for the sector at the least cost.¹⁵
- 1.23 The Not-for-profit Sector Reform Council stated in evidence that the key point of the new body is that it should be independent.¹⁶ The Bills deliver this and the committee supports the structure of the Commission on this basis. The legal independence of the Commissioner, and how the Commission will interact with the ATO, is discussed later in this chapter.

Support in the sector

- 1.24 The general thrust of submissions to the committee was that stakeholders supported the Bills, but they had a range of suggestions for improving Bills.¹⁷ The overall support amongst the sector for the legislation was summarised by the Commission's Implementation Taskforce as follows:

In the consultations we had around Australia – bearing in mind that people self-select to go to those – there were very few dissenting or angry voices, and those that were there were cynical about red-tape reduction; they believed it would be an increase in the administrative burden. For some, the issue is a sense of a Big

15 Treasury, *Explanatory Materials*, pp. 233-54.

16 Ms Linda Lavarch, NSRC, *Committee Hansard*, Canberra, 26 July 2012, p. 20.

17 For example, Philanthropy Australia, *Submission 20*; The Salvation Army Australia, *Submission 22*; Australian Major Performing Arts Group, *Submission 39*.

Brother. They believe the sector is operating okay, and they do not see a need for this. But it is a very small minority. We had, overwhelmingly, support for the establishment of the ACNC – as I said in my opening statement, it was not unconditional – and there is no doubt they will judge us to be effective by the degree to which we can reduce red tape.¹⁸

- 1.25 It is clear to the committee from the breadth of the evidence that the sector supports the Bills and is committed to cooperating with the Government to bring about effective, workable legislation that will benefit the sector and, in turn, the wider community.

Treasury consultations

- 1.26 Like many complex policy proposals, the Bills have been through an extended consultation process. Key aspects to the consultation were:
- conducting a scoping study on the regulator, which led to 160 submissions and a final report being issued in July 2011;
 - receiving 108 submissions to an initial draft of the legislation, which closed in January 2012;
 - ACNCIT community consultations in all capital cities and Townsville, which were attended by approximately 1,600 people and concluded in February 2012; and
 - targeted consultation on a further draft in May 2012.¹⁹
- 1.27 From the committee's perspective, the most important outcome from consultations is that improvements are made to legislation to improve its workability for all parties. Compared with the initial Bills, the legislation has been refined and improved in relation to the objects clause, registration, deregistration, the Register, governance standards, reporting, duty to notify, information gathering and monitoring powers, enforcement powers, the secrecy framework, review and appeals, penalties, coverage of directors and management committees, and coverage of basic religious charities.²⁰ In other words, the changes have been comprehensive.

18 Ms Susan Pascoe, ACNCIT, *Committee Hansard*, Canberra, 26 July 2012, p. 13.

19 Treasury, *Submission 32*, p. 18.

20 Treasury, *Submission 32*, pp. 19-23.

- 1.28 A number of organisations concurred that the consultations were productive, although some individual deadlines were tight.²¹ The Community Council of Australia provided its overview of consultations:

It has been very positive seeing the changes that have happened to the bill through the consultation processes. We have to remember that this entity was first proposed almost 18 months ago ... When the first exposure draft came out, we had quite a lot of concerns. Initially we had trouble getting Treasury to acknowledge those concerns. I think we now have had those concerns acknowledged, and the redrafting of the bill as is currently is addresses many of those concerns.²²

Overview of the Bills

- 1.29 The discussion below covers the main points in the Bills. A key concept in the Bills is the term 'entity'. This can refer to an individual, a body politic, a body corporate, a trust, or any other unincorporated association or body of persons.

Constitutional basis

- 1.30 The Commonwealth does not have an explicit power to legislate for the sector. Therefore, different heads of power are used to support the Bills:
- the taxation power (subsection 51(ii) of the Constitution) supports the registration scheme as a requirement for these entities' eligibility for Commonwealth tax concessions, as well as related processes such as record keeping, reporting and enforcement;
 - the communications power (subsection 51(v)) supports publishing the Australian Charities and Not-for-profits Register, as well as related processes;
 - the corporations power (subsection 51(xx)) gives the Commonwealth a general power to legislate for corporations, which in this instance means corporations under the *Corporations Act 2001*. The Bills refer to

21 Mr Barry Wallett, ISCA, *Committee Hansard*, Canberra, 26 July 2012, p. 31; Ms Linda Lavarch, NSRC, *Committee Hansard*, Canberra, 26 July 2012, p. 18; Rev. Brian Lucas, ACBC, *Committee Hansard*, Canberra, 27 July 2012, p. 37; Mr John Colvin, AICD, *Committee Hansard*, Canberra, 27 July 2012, p. 19.

22 Mr David Crosbie, CCA, *Committee Hansard*, Canberra, 27 July 2012, p. 3.

these as ‘federally regulated entities’, which are subject to a wider range of enforcement provisions by the Commissioner;

- the territories power (section 122) gives the Commonwealth a general power to legislate for entities incorporated in a territory. These are also regarded as federally regulated entities;
- the external affairs power (subsection 51(xxxix)) supports the establishment of external conduct standards and related processes for all entities.²³

Registration

- 1.31 Registration by the Commissioner will entitle entities to access Commonwealth tax concessions. Initially, only charities will be registered.
- 1.32 Entities that are already recognised as charities by the ATO and are income tax exempt will be taken to be registered with the Commissioner at the commencement of the Bills on 1 October 2012. This streamlined transitional provision means that they do not need to take any other action to be registered. The same applies to two subtype charities: health promotion charities and public benevolent institutions.
- 1.33 Religious institutions that may be self-assessing as income tax-exempt under item 1.2 in section 50-5 of the *Income Tax Assessment Act 1997*, which do not fit into the above categories, will continue on this basis after 1 October 2012. However, they must notify the Commissioner of their type and subtype within 12 months.
- 1.34 Broadly, an entity is entitled to register if it:
- meets the description of the relevant type or subtype;
 - is a not-for-profit entity;
 - meets the governance standards and external conduct standards;
 - has a current ABN; and
 - is not characterised as engaging in, or supporting, terrorist or other criminal activities under an Australian law.
- 1.35 The Bill will not change the current definitions of a charity or the various subtypes. The Government is conducting separate consultations on this matter. Entities can register as multiple subtypes, provided they meet the

23 Treasury, *Explanatory Materials*, pp. 19-24.

relevant definitions. If the Commissioner rejects an application for registration, the entity will be able to seek a review of this decision.

- 1.36 The Commissioner will be able to revoke registration if one of the following apply:
- the registered entity is not entitled to be registered as that type of entity (or as the subtype of entity);
 - in its application, the registered entity provided false or misleading information on a material matter;
 - the registered entity has contravened, or is likely to contravene a provision of this law, or has not complied, or is likely to not comply with a governance standard or an external conduct standard (a mere suspicion or the possibility of contravention is insufficient for this item);
 - the registered entity has a liquidator or similar arrangement because it is unable to pay all its debts when they become due and payable; or
 - the entity requested that its registration as a type or subtype of entity be revoked.
- 1.37 In deciding whether to revoke registration, the Commissioner must consider:
- the nature, significance and persistence of any contravention or non-compliance;
 - what action the Commissioner, the registered entity, or any of the responsible entities could have or have taken:
 - ⇒ to address any contravention or non-compliance (or prevent any likely contravention or non-compliance); or
 - ⇒ to prevent any similar contravention or non-compliance;
 - the desirability of ensuring that contributions made to the registered entity are applied consistently with the NFP nature and the purpose of the registered entity;
 - the objects of any Commonwealth laws that refer to registration under this Bill;
 - the extent (if any) to which the registered entity is conducting its affairs in a way that may cause harm to or jeopardise the public trust and confidence in the NFP sector; and
 - any other matter that the Commissioner considers relevant.

- 1.38 It is expected that revocation of registration will only occur when other avenues have been exhausted. For example, the Commissioner will have the power to issue a notice to an entity for it to show cause why its registration should not be revoked. The notice must state the grounds on which notice is given and the entity will have 28 days in which to respond. However, in very serious cases, the Commissioner is not required to issue this notice and can revoke registration immediately.²⁴

The Australian Charities and Not-for-profits Register

- 1.39 The Commissioner will be required to maintain the Register and publish it on the Internet. The information on the Register is to be consistent with that published by charities regulators overseas and includes:
- identifying and contact details of the entity;
 - registration status;
 - the entity's governing rules and its responsible entities (directors etc.);
 - information statements and financial reports;
 - details of any enforcement action taken by the Commissioner and the outcome; and
 - any other information as prescribed in the regulations, provided that the Commissioner is authorised to collect it.
- 1.40 The Commissioner is able to withhold or remove information from the Register, if the information:
- is commercially sensitive and has potential to cause damage to the entity or an individual;
 - is inaccurate or likely to cause confusion or mislead the public;
 - is offensive;
 - could endanger public safety; or
 - is specified in the regulations.
- 1.41 Generally, the Commissioner can nonetheless publish or remove information from the Register if the public interest outweighs these specific legislative provisions.²⁵

24 Treasury, *Explanatory Materials*, pp. 25-41, 203-06.

25 Treasury, *Explanatory Materials*, pp. 43-47.

Governance standards and external conduct standards

Overview

- 1.42 The Bills allows for the inclusion of governance standards and external conduct standards in the regulations. These can include an entity's governing rules, its conduct and its processes. In addition, all registered entities will be subject to external conduct standards (that is, relating to their conduct outside Australia). The standards are expected to be principles-based and to focus on outcomes, rather than detailing how they are to be met.
- 1.43 Compliance with the standards is a condition of registration.

Terrorism and other criminal activities

- 1.44 The Explanatory Memorandum to the Bills states that Australian not-for-profit entities have, in the past, provided support for terrorism and other criminal activities. This has occurred both unwittingly and deliberately.
- 1.45 The Financial Action Task Force is an international, inter-governmental body established in 1989 to promote how to combat money laundering, terrorist financing and other threats to the international financial system. Australia is a member of the Task Force and has agreed to comply with its recommendations. Special recommendation VIII states:
- VIII. Non-profit organisations
- Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:
- by terrorist organisations posing as legitimate entities;
 - to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
 - to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.
- 1.46 In its last review in 2005, the Task Force found that Australia was only partially compliant with this special recommendation.²⁶

26 Treasury, *Explanatory Materials*, pp. 49-57.

Reporting and record keeping

Record keeping

- 1.47 A registered entity is required to keep records of its transactions, financial position and performance. The records must be sufficient to enable:
- the preparation and audit of financial statements;
 - an assessment of its entitlement to be registered as a type or sub-type (this assessment is undertaken by the Commissioner);
 - an assessment of its compliance with the Bill and regulations (undertaken by the Commissioner); and
 - an assessment of compliance with any taxation law (undertaken by the Commissioner of Taxation).
- 1.48 Failure to maintain adequate records is an offence of strict liability of 20 penalty units (\$2,200). This is low when compared with similar tax offences for businesses.

Proportionality

- 1.49 Reporting requirements are proportional to the size of the entity. The thresholds between small and medium, and medium and large entities are set at revenues of \$250,000 and \$1 million respectively. Revenues are calculated in accordance with the accounting standards. The Commissioner also has the discretion to set an entity's size for a financial year to flexibly manage one-off events for an entity, such as a large one-off bequest.

Information statements

- 1.50 All registered entities will be required to lodge an information statement with the Commissioner within six months of its reporting year. This will be the financial year, unless entities use a substituted accounting period. Administrative penalties may apply for late lodgement, although the Commissioner will be able to provide extensions if circumstances require.
- 1.51 The Commissioner will set the content of the information statements, which will probably include matters such as governance, finance, purposes, objects and beneficiaries. The statements may have different, proportional requirements for small, medium and large entities.

Financial reporting

- 1.52 Medium and large registered entities must submit annual financial reports to the Commissioner within six months of the end of their financial year. The content of the reports will be set out in regulations and are expected to have some basis in the accounting standards. Basic religious charities do not need to submit financial reports, but if they do, they must comply with all requirements.
- 1.53 The Commissioner may approve a substituted accounting period (i.e. a financial year not ending on 30 June) for an entity. If an entity currently uses a substituted accounting period under Australian law, and it advises the Commissioner of this within six months of the commencement date, it will be taken to have the Commissioner's approval to do so.
- 1.54 If a registered entity identifies a material error in its financial report, it must supply the Commissioner with a corrected report within 28 days.

Miscellaneous

- 1.55 The Commissioner will have the power to require a registered entity, or class thereof, to provide additional information in reports, or provide additional reports, through a written determination. This is expected to only be used where a registered entity is suspected of breaching the Bill.
- 1.56 The Bill includes provisions to facilitate collective and joint reporting by related entities to reduce their compliance costs.

Audits and reviews

- 1.57 Large entities must have their financial report audited and obtain an auditor's report. Medium entities can have their financial report reviewed instead. However, the Commissioner can require a medium entity to be subject to audit. This is expected to occur where this entity has a history of non-compliance.
- 1.58 Reviews provide a lower level of assurance than an audit. The latter is conducted according to audit standards by a registered company auditor, an audit firm or authorised audit company. A review is conducted to lesser standards and can be conducted by a member of the Institute of Chartered Accountants in Australia or CPA Australia.²⁷

27 Treasury, *Explanatory Materials*, pp. 59-72, 207-09.

Duty to notify

- 1.59 The Bills will require registered entities to notify the Commissioner if any of the following have occurred:
- its name or address have changed;
 - its governing rules have changed;
 - its responsible entities (e.g. directors) have changed;
 - it has significantly contravened a provision of the Act and it therefore is no longer entitled to be registered as a particular type or subtype; and
 - it has significantly contravened a governance or external conduct standard and it therefore is no longer entitled to be registered as a particular type or subtype.
- 1.60 In determining the significance of contravention or non-compliance, it is important to consider:
- the nature, significance and persistence of the conduct; and
 - the desirability of ensuring that contributions to the entity are applied for its not-for-profit nature and the entity's stated purpose.
- 1.61 Medium and large entities must give the Commissioner notice of these matters as soon as possible, but no later than 28 days. The same generally applies to small entities, except that their maximum period is 60 days. Where the matter involves a significant breach of the Act by a small entity, the maximum notification period is 28 days.
- 1.62 Penalties apply for not notifying the Commissioner of matters required under law. These are adjusted for the extent to which an entity seeks to cooperate with the Commissioner and are discussed below.²⁸

Information gathering and monitoring powers

Information gathering

- 1.63 In addition to receiving information statements and financial reports, the Commissioner will have other ways of obtaining information about entities. These extra powers are appropriate because the Commissioner will provide a centralised service to Commonwealth agencies about

28 Treasury, *Explanatory Materials*, pp. 73-78.

entities' charitable status and whether they meet certain standards of governance.

- 1.64 The Commissioner will have the power to gather information and documents that are reasonably necessary to determine whether:
- a registered entity has complied with a provision subject to monitoring in the Bills; or
 - information given by a registered entity is correct and accurate.
- 1.65 The Commissioner can send information requests to any entity. They do not need to be registered. The Commissioner can send a written notice to an entity requesting that it:
- give to the Commissioner any information, within the period and in the manner and form specified in the notice;
 - attend and give evidence before the Commissioner for the purpose of obtaining information;
 - produce any documents to the Commissioner, within the period and in the manner specified in the notice; or
 - make copies of any documents and to produce them to the Commissioner, within the period and in the manner specified in the notice.
- 1.66 An entity that does not comply with one of these requests commits an offence. The penalty is 20 penalty units (\$2,200), which is low when compared with similar tax offences for businesses. The minimum period that the Commissioner can set for compliance is 14 days.
- 1.67 These powers are appropriate because organisations in the sector are subject to less oversight than other organisations in our society, such as a business. For example, the latter is overseen by investors and ASIC oversees business corporations. Charities and not-for-profits obtain revenue and resources from donors and volunteers and often provide services for the most vulnerable members of the community. The Commissioner's oversight of the sector will help ensure that the benefits it provides to the community will be maximised.
- 1.68 The Bills also recognise the privilege against self incrimination. In addition to the importance of fundamental principles of justice, overriding this privilege carries the risk that entities and individuals will be less likely to provide information that the Commissioner requires. Therefore, evidence gained through these processes will only be admissible in court if they relate to:

- failure to comply with the Commissioner's written notice;
- contraventions of section 137.1 or 137.2 of the *Criminal Code*, which relate to false or misleading information; and
- contraventions of section 149.1 of the *Criminal Code*, which relate to obstruction of Commonwealth public officials.

Monitoring powers

- 1.69 Officers of the Commission will be able to enter the premises of an entity and exercise monitoring powers in relation to compliance with a provision subject to monitoring. Officers will only be able to do this if the occupier of the premises has consented, or entry is made under a monitoring warrant. Warrants are to be issued by magistrates. Officers will not be limited to accessing premises of registered entities, but the information sought must be necessary to administering the legislation.
- 1.70 Provisions subject to monitoring include:
- a provision of a legislative instrument made under this Bill or a provision of the Bill or that creates an offence;
 - a provision of the *Crimes Act 1914* or the *Criminal Code* that creates an offence, to the extent that the offence relates to the Bill or a legislative instrument made under the Bill;
 - a provision of the Bill or a legislative instrument made under the Bill, if non-compliance with the provision gives rise to an administrative penalty; and
 - ongoing eligibility for registration including conditions for registration in clause 25-5 and for the revocation of registration in clause 35-10.
- 1.71 Information subject to monitoring includes information given to the Commissioner:
- in compliance or purported compliance with a provision of the Bill or of a legislative instrument made under the Bill;
 - in compliance or purported compliance with a provision of the *Crimes Act 1914* or of the *Criminal Code*, to the extent that the provision relates to the Bill or a legislative instrument made under the Bill; or
 - any other information given to the Commissioner, including information given voluntarily, which is included on the Australian Charities and Not-for-profits Register.

- 1.72 Officials of the Commission have a range of monitoring powers that they can use when they can enter premises. It must be remembered that these powers will often be exercised on the behalf of other Commonwealth agencies because they will ultimately use it in administering their own functions.
- 1.73 The monitoring powers given to Commission officials are:
- the power to search the premises and anything on the premises;
 - the power to examine or observe any activity conducted on the premises;
 - the power to inspect, examine, take measurements of, or conduct tests on, anything on the premises;
 - the power to make any still or moving image or any recording of the premises or anything on the premises;
 - the power to inspect any document on the premises;
 - the power to take extracts from, or make copies of, any such document;
 - the power to take onto the premises such equipment and materials as the ACNC officer requires for the purpose of exercising powers in relation to the premises;
 - the power to sample anything on the premises; and
 - the powers set out in the Bill including the power to operate electronic equipment on the premises and the authority to have other individuals assist Commission officers.
- 1.74 Information gained from these powers will not be used against individuals in criminal proceedings, except where it relates to offences listed above in relation to the exceptions against the privilege against self incrimination.²⁹

Education, compliance and enforcement

Overview

- 1.75 The Bills will give the Commissioner the enforcement powers to:
- issue warning notices;
 - issue directions;

²⁹ Treasury, *Explanatory Materials*, pp. 79-96.

- enter into enforceable undertakings;
 - apply to the courts for injunctions;
 - suspend or remove responsible entities (e.g. directors); and
 - appoint acting responsible entities.
- 1.76 Generally, these powers will only be exercisable over federally regulated entities (those regulated under the corporations and territories powers). The exception is for external conduct standards, when the Commissioner's enforcement powers will be exercisable over all registered entities.
- 1.77 These enforcement powers are similar with those in overseas jurisdictions, such as the Charities Commission of England and Wales and the Office of the Scottish Charity Regulator. They also offer much more flexibility than that available to the ATO, the current default regulator, which can only revoke an entity's access to a tax concession. ASIC, which regulates some charities, has a wider range of enforcement powers such as being able to issue directions, entering into enforceable undertakings, and applying for injunctions.

Application and necessity clauses

- 1.78 These constrain the actions of the Commissioner to ensure that their enforcement powers are only used appropriately. They generally apply to the Commissioner's enforcement powers.
- 1.79 The application clause provides that the Commissioner is only able to use enforcement powers if:
- an entity is a federally regulated entity, and the Commissioner reasonably believes that the entity has contravened, or is likely to contravene, a provision in the Bill;
 - an entity is a federally regulated entity, and the Commissioner reasonably believes that the entity has not complied, or is likely to not comply, with a governance standard; or
 - the Commissioner reasonably believes that the registered entity has not complied, or is likely to not comply, with an external conduct standard.
- 1.80 The necessity clause provides that the Commissioner can only use enforcement powers when it is necessary to directly address the contravention or likely contravention of the Bills, or the non-compliance or likely non-compliance with a governance standard or external conduct standard.

Applying the Commissioner's discretion

- 1.81 Before using an enforcement power, the Commissioner must take the following into account:
- the nature, significance and persistence of the contravention or non-compliance;
 - the actions the Commissioner, the registered entity, or any of the responsible entities could have taken to address the contravention or non-compliance (or prevent the likely contravention or non-compliance);
 - the actions the Commissioner, the registered entity, or any of the responsible entities could have taken to prevent any similar contravention or non-compliance in the future;
 - the desirability of ensuring that contributions made to the registered entity are applied consistently with the not-for-profit nature, and the purpose, of the registered entity;
 - the objects of any Commonwealth laws that refer to registration under this Bill;
 - the extent (if any) to which the registered entity is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence in the sector; and
 - any other matter of policy that the Commissioner considers relevant.

Matters specific to individual enforcement powers

- 1.82 The Commissioner must make warning notices, enforceable undertakings, and the suspension or removal of responsible entities publicly available on the Register.
- 1.83 The Commissioner may direct a registered entity not to enter into a specified commercial transaction, financial transaction or other transaction. They are required to comply, regardless of any provision in their governing rules or any contract it has entered into.
- 1.84 The application and necessity clauses do not apply to enforceable undertakings because they are agreements that are voluntarily entered into by the Commissioner and a registered entity.
- 1.85 A responsible entity (e.g. director) that is suspended or removed may not communicate instructions or wishes with the registered entity. Doing so attracts a strict liability offence of 50 penalty units (\$5,500). The

Commissioner may appoint an interim responsible entity and direct them to do specific acts in relation to the entity. It is expected that the Commissioner will only suspend or remove responsible entities for serious contraventions or non-compliance.³⁰

The Commission and the Advisory Board

The Commission

- 1.86 The Commission will comprise the Commissioner and all staff assisting the Commissioner that are employed under the *Public Service Act 1999* and are subject to the Commissioner's directions. The staff will be provided by the ATO, but they will be responsible to the Commissioner and take directions from them. Staff will be required to comply with the directions of the Commissioner if there is a conflict with directions from the ATO.
- 1.87 The Commissioner will be an independent statutory office and will not be subject to direction of a Minister or agency. Their term of appointment will be five years and they will be eligible for re-appointment. The usual conditions for termination of appointment apply for independent statutory officers, such as bankruptcy, misbehaviour, incapacity, or being absent without leave.
- 1.88 The Commissioner must disclose to the Minister all their interests that may conflict with the proper performance of their duties. They will not be able to engage in paid employment without the Minister's approval.
- 1.89 The Bills establish a Special Account, through which the Commission will be funded. It will sit with the portfolio budget statements of the ATO and will be accounted for as its own item. A memorandum of understanding will be signed between the Commissioner and the Commissioner of Taxation to set out how the two agencies will work together, including how the Commissioner will independently manage the Commission's budget.
- 1.90 The Commissioner must provide an annual report to the Minister as soon as possible after the end of each financial year.

The Advisory Board

- 1.91 The Bills establish an Advisory Board comprising two to eight members. Collectively, they must have expertise in relation to the sector, or

³⁰ Treasury, *Explanatory Materials*, pp. 97-133.

experience and qualifications in law, tax or accounting. They must also disclose any possible conflicts of interest to the Minister. Members can be appointed for a period of up to three years.

- 1.92 The Board's function is to provide advice, in response to a request from the Commissioner, in relation to the Commissioner's legal functions. It must meet at least four times a year. The Board will have no decision-making powers and it is not expected to spend public monies.³¹

Secrecy framework

Overview

- 1.93 Generally, information obtained by the Commissioner is to be protected and kept confidential, unless the Commissioner is legally entitled to disclose it under the Bills. This includes providing information to other agencies under the Commissioner's role of being a 'one-stop-shop' regulator and the publication of information statements, financial reports and other documents on the Register. Disclosure by a Commission officer attracts a criminal offence, with a maximum penalty of two years imprisonment and a fine of 120 penalty units (\$13,200).
- 1.94 Some current secrecy provisions will continue to apply to information collected by the Commissioner, including those under the *Tax Administration Act 1953* and the privacy principles. Conversely, some Commonwealth legislation will override the Bills in allowing some agencies to access information. These provisions include:
- sections 32 and 33 of the *Auditor-General Act 1997*;
 - section 9 of the *Ombudsman Act 1976*;
 - section 44 of the *Privacy Act*;
 - section 12 of the *Parliamentary Privileges Act 1987*; and
 - Schedule 6 to the *Anti-Terrorism Act (No. 2) 2005*.
- 1.95 Information that must be protected is that disclosed to or obtained by a Commission officer for the purposes of the Bills. Information that does not identify an entity or is already public is not included in the prohibition. For these provisions, a Commission officer includes:
- an entity engaged to provide services relating to the Commission;

31 Treasury, *Explanatory Materials*, pp. 135-45.

- an individual employed by an entity referred to above;
- an individual appointed or employed by, or performing services for, the Commonwealth or an authority of the Commonwealth that is performing functions or exercising powers under, or for the purposes of, the Bill; or
- a member of the Advisory Board.

Exceptions

1.96 The exceptions to the general prohibition against disclosure include:

- to the entity to whom the information relates;
- to an Australian government agency;
- disclosure or use in the performance of duties under the Bill;
- disclosure on the Australian Charities and Not-for-profits Commission Register (ACN Register) to achieve the objects of the Bill;
- disclosure or use with consent of the entity; and
- disclosure of information lawfully made available to the public.

1.97 A Commission office cannot be compelled to disclose protected information to a court or tribunal except where it is necessary for the purposes of the Bills.

On-disclosure by Commonwealth agencies

1.98 Where an agency receives information from the Commission under the Bills, typically for that agency's functions, there will be a general prohibition on the agency further disclosing the information. On-disclosing this information attracts a criminal offence, with a maximum penalty of two years imprisonment and a fine of 120 penalty units (\$13,200).

1.99 The exceptions include:

- on-disclosure to the entity to whom the information relates;
- on-disclosure or use of information for the original purpose or in connection with the original purpose that it was disclosed; and

- on-disclosure of information that has lawfully been made available to the public.³²

Transitional provisions

- 1.100 In order to ensure a smooth transition for the Commission, ATO officers can disclose tax information about an entity to the Commissioner, provided it relates to the functions under the Bills. This will only apply for six months after the commencement date. Therefore, the Commission will be fully functional from the commencement date and does not need to contact entities individually for information which the ATO already has.³³

Reviews and appeals

Overview

- 1.101 The review and appeal process in the Bills is closely modelled on that in Part IVC of the *Taxation Administration Act 1953*. Two advantages of this approach are that the process will be familiar to stakeholders and it will also allow appeals against decisions of the Commissioner and the Commissioner of Taxation to be heard together.
- 1.102 Only an entity directly affected by a decision can request a review or make an appeal and only in respect of 'administrative decisions'. These are defined in the Bill as:
- a refusal of an application for registration or registration itself;
 - a revocation of registration;
 - a decision to give a direction;
 - a decision to vary a direction;
 - a decision not to vary or revoke a decisions after 12 months;
 - a decision to suspend the responsible entity;
 - a decision to change when a suspension of the responsible entity ends;
 - a decision to remove a responsible entity; and
 - a decision to remit all or a part of an administrative penalty.
- 1.103 Entities will have four avenues of review and appeal:

32 Treasury, *Explanatory Materials*, pp. 147-61.

33 Treasury, *Explanatory Materials*, pp. 211-13.

- making an objection to the Commissioner of an administrative decision;
- requesting the AAT to review an objection decision or an extension-of-time-refusal decision;
- asking the courts to review an objection decision; or
- making a combined application for AAT review or appeal to the court.

Objecting to an administrative decision

- 1.104 An entity must lodge its objection to the decision within 60 days of it being served on the entity. This is consistent with the time provided under tax provisions, for example section 14ZW of the *Taxation Administration Act 1953*. The Commissioner has the discretion to accept late lodgements, depending on the circumstances of the case.
- 1.105 The Commissioner must respond within 60 days and can ask for additional information, whereupon the time period is reset to 60 days. If the Commissioner does not respond within the time period, they are taken to have disallowed the objection.
- 1.106 The Commissioner must inform the entity of their decision in writing, which must also inform the entity that they may request reasons for the decision. Reasons must be provided within 28 days.

AAT review of an objection decision or extension of time refusal decision

- 1.107 The entity seeking review has the burden of proof in demonstrating that the Commissioner's decision was made in error. This is consistent with Part IVC of the *Taxation Administration Act 1953*. Entities are also required to comply with the Commissioner's decision until the AAT review is finalised. This prevents Commonwealth agencies incurring unnecessary costs. Once appeal rights from the AAT's decision expire, it becomes final and the Commissioner has 60 days to implement it.
- 1.108 The *Administrative Appeals Tribunal Act 1975* generally operates in relation to these matters. The main exceptions are AAT procedures that are amended for this legislation to be consistent with provisions in the Bills. For example, section 27 of the Act states that having an 'interest' is sufficient to appeal a decision, whereas the Bills have the higher standard of an appellant requiring a 'direct interest'. Another example is precluding the operation of section 41, which allows the AAT to stay or vary the decision. As discussed above, the Bills seek to remove this possibility for certain decisions in the interests of more efficient administration.

Reviewing an objection decision by the courts

- 1.109 In order to obtain a review of an objection decision, the entity must lodge the appeal with the court within 60 days of receiving written notice of the decision from the Commissioner. The entity will have the burden of proof in demonstrating that the Commissioner's decision was incorrect.
- 1.110 As above, the lodgement of an appeal does not affect the validity of the Commissioner's decision. The Commissioner only needs to rectify their decision once a court order changing their decision is final. This occurs where there are no avenues of appeal remaining, or the appeal period has expired. The Commissioner then has 60 days to rectify their decision.³⁴

Penalties and offences

Administrative penalties

- 1.111 The Bills establish a regime for administrative penalties. These can be imposed by Commonwealth agencies without the need for court action. It is not expected that they will be imposed frequently. However, appropriate sanctions are required for a deterrent effect and to protect those who seek to cooperate with the Commissioner. The regime is proportional and takes into account the conduct of the entity involved.
- 1.112 The main categories of administrative penalties are for false or misleading statements or failure to lodge documents on time. For the former, the penalty amount is:
- 20 penalty units (\$2,200) where the false or misleading statement was due to a failure to take reasonable care to comply with the Act;
 - 40 penalty units (\$4,400) for recklessness; and
 - 60 penalty units (\$6,600) for intentional disregard.
- 1.113 The penalty can be increased or decreased by 20 per cent where the entity sought to obstruct the Commissioner or voluntarily disclose the error to the Commissioner, respectively.
- 1.114 For failure to lodge documents on time, the base penalty amount is 1 penalty unit (\$110) for each 28 day period that the document is late, up to a maximum of 5 penalty units. This base amount applies to small entities. It is doubled for medium entities and multiplied by five for large entities.

34 Treasury, *Explanatory Materials*, pp. 163-75.

- 1.115 Administrative penalties will be payable within 14 days of the Commissioner issuing the penalty notice. The Commissioner may remit part of or the entire penalty. If they do not remit the entire penalty, they must provide reasons to the entity. The general interest charge (GIC) will apply to unpaid penalty amounts and will be collectable by the ATO. This will centralise Government debts and improve cost effectiveness.

Offences

- 1.116 The Bills impose obligations, liabilities or offences on individuals, referred to as 'covered entities', which are responsible for managing the organisation (or entity) in question. This is particularly important in the case of unincorporated associations, because the organisation has no legal status. The relevant covered entities are:
- each member of the committee of management (or 'directors') of an unincorporated association;
 - the trustee of a non-corporate trust; and
 - the directors of a corporate trustee or of a registered body corporate.
- 1.117 Obligations are imposed on the covered entities at the same time as an obligation is imposed on the relevant entity. Liabilities that are payable under the Bills by these trusts and unincorporated associations are payable by each covered entity at the time the amount becomes payable. Covered entities are only liable if the liability arose because of their misconduct, with the precise requirements varying across the type of entity.
- 1.118 Defences also apply, for which the defendant will bear the burden of proof. Covered entities will have a defence where, due to ill health or other reason, they either did not take part in the management of the entity, or it would have been unreasonable to expect them to do so. The second defence is where the covered entity took all reasonable steps to ensure that the offence did not occur, or there were no such steps available.³⁵

35 Treasury, *Explanatory Materials*, pp. 187-201.

Objectives and conduct of the inquiry

- 1.119 The objective of the inquiry was to investigate the adequacy of the Bills in achieving their policy objectives and, where possible, identify any unintended consequences.
- 1.120 Details of the inquiry were placed on the committee's website. On Friday, 6 July 2012, the Chair issued a media release announcing the inquiry and seeking submissions.
- 1.121 The committee received 79 submissions and supplementary submissions, and four exhibits. They are listed in Appendix A. The submissions are available on the committee's website at www.aph.gov.au/economics.htm.
- 1.122 The committee held public hearings in Canberra on Thursday and Friday, 26 and 27 July 2012. The witnesses who appeared at the hearing are listed in Appendix B. The hearing transcripts are also available on the committee's website.

