



Parliamentary Joint Committee on Corporations and Financial Services

Inquiry into the Australian Charities and Not-for-profits
Commission Bill 2012; the Australian Charities and Not-for-profits
Commission (Consequential and Transitional) Bill 2012; and
the Tax Laws Amendment (Special Conditions for Not-for-profit
Concessions) Bill 2012

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Duties of the Committee

Section 243 of the *Australian Securities and Investments Commission Act 2001* sets out the Parliamentary Committee's duties as follows:

- (a) to inquire into, and report to both Houses on:
 - (i) activities of ASIC or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or
 - (ii) the operation of the corporations legislation (other than the excluded provisions), or of any other law of the Commonwealth, of a State or Territory or of a foreign country that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); and
- (b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and
- (c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

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Acronyms and Abbreviations

ABN	Australian Business Number
ACNC	Australian Charities and Not-for-profits Commissioner
ACNC Bill	Australian Charities and Not-for-profits Commission Bill 2012
AICD	Australian Institute of Company Directors
ATO	Australian Taxation Office
BCR	Basic Religious Charity
COAG	Council of Australian Governments
DGR	Deductible Gift Recipient
EM	Explanatory Memorandum
FATF	Financial Action Task Force on Money Laundering
ICAA	Institute of Chartered Accountants Australia
ITAA	<i>Income Tax Assessment Act 1997</i>
NFP	Not-for-profit
PC	Productivity Commission
PJC	Parliamentary Joint Committee on Corporations and Financial Services
TLAB	Tax Laws Amendment (Special Conditions for not-for-profit Concessions) Bill 2012

Recommendations

Recommendation 2.1 (page 27)

2.71 The committee recommends that the definition of a 'basic religious charity' (BRC) in the Australian Charities and Not-for-profits Commission Bill 2012 be modified to enable an entity to retain their current status as a BRC in cases where they operate a school building fund with deductible gift recipient status within the entity. The committee recommends that the bill be amended to this effect.

Recommendation 2.2 (page 31)

2.87 The committee recommends that as part of the five year review of the operation of the ACNC, the annual reporting requirement thresholds are reviewed. This review should consider the evidence that existing thresholds have been fairly and appropriately set based on the need for transparency and risk-management on one hand with the compliance burden on the other.

Recommendation 2.3 (page 31)

2.89 The committee acknowledges that schools are required to provide annual financial reports to the Australian Curriculum, Assessment and Reporting Authority as part of the My School website. This data is extensive and thus the Australian Charities and Not-for-profits Commission should accept that data as suitable to meet the annual financial reporting requirements in the ACNC Bill. The committee recommends that the Bill be amended to this effect.

Recommendation 2.4 (page 33)

2.96 The committee recommends that the Australian Charities and Not-for-profits Commission Bill 2012 be passed.

Recommendation 3.1 (page 43)

3.31 The committee recommends that upon the establishment of the Australian Charities and Not-for-profits commission on 1 October 2012, the Commissioner promptly engages stakeholders to devise a set of governance standards and reporting requirements for the sector. These requirements must balance the need for probity and transparency with an acknowledgement of the time and cost that these arrangements may pose, particularly for smaller entities.

Recommendation 3.2 (page 43)

3.32 The committee recommends that the Australian Charities and Not-for-profits (Consequential and Transitional) Bill 2012 be passed.

Recommendation 4.1 (page 56)

4.37 The committee recommends that the Australian Taxation Office circulate guidance material relating to Schedule 1, Item 38 of the Taxation Laws Amendment (Special Conditions for Not-for-Profit Concessions) Bill 2012. This material should be developed in consultation with stakeholders and should provide examples which illustrate the responsibilities of donors in checking recipient entities' expenditure.

Recommendation 4.2 (page 59)

4.50 The committee recommends that Treasury issue guidance material in relation to proposed section 995-1(1) of the *Income Tax Assessment Act 1997*. This material should:

- state the intent and the intended consequence of the definition;
- state that the definition is intended to align with definitions of a 'not for profit company' in other statutes; and
- clarify that where entities return any surplus to the not-for-profit purpose, the entity shall not lose its tax exempt status.

Recommendation 4.3 (page 61)

4.53 The committee recommends that the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 be passed.

Chapter 1

Introduction

The referral

1.1 On 23 August 2012, the House of Representatives referred the Australian Charities and Not-for-profits Commission Bill 2012 ('the ACNC Bill'), the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 and the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 ('the TLAB') to the Parliamentary Joint Committee on Corporations and Financial Services for inquiry and report.

1.2 The same day, the Senate Selection of Bills Committee referred the three bills to the Senate Community Affairs Legislation Committee for inquiry and report by 12 September 2012. As at the date of this report, the Senate Community Affairs Legislation Committee had not presented its report.

1.3 The Parliamentary Joint Committee (PJC) on Corporations and Financial Services was established under section 243 of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) to monitor, among other matters, the operation of Australia's corporations legislation and to inquire into the activities of the Australian Securities and Investments Commission (ASIC). The committee is therefore particularly interested in those aspects of the bills that relate to ASIC and the operation of the Corporations Act (see chapter 3).

1.4 This inquiry follows an inquiry by the House of Representatives Standing Committee on Economics into the exposure draft of the ACNC Bill and the Consequential and Transitional Bill. That committee made 11 recommendations to amend the draft legislation, all of which the government accepted. Part of the PJC's immediate interest, therefore, is to gauge stakeholders' views on whether these amendments adequately meet their concerns (see chapter 2).

1.5 Although this inquiry has had a truncated timeframe, it is broader in remit than the House Economics inquiry in that the PJC has also considered the provisions of the TLAB (see chapter 4).

Conduct of the inquiry

1.6 The inquiry was advertised in *The Australian* newspaper on 29 August 2012. Details of the inquiry, the bills and associated documents were placed on the committee's website.

1.7 The PJC and the Senate Community Affairs Committee agreed to send joint invitations to stakeholders to make a submission. Individuals and organisations were

given the option of lodging a submission with one or both committees. The committees wrote to 59 organisations and individuals inviting submissions by 30 August 2012.

1.8 The PJC received 47 submissions which are listed in Appendix 1. The Senate Community Affairs Committee received 48 submissions, which are listed on its website.¹ Forty organisations submitted to both committees. Readers wanting a full list of submissions to both committees should note that the following organisations submitted only to the Senate committee: Catholic Social Services Australia, FamilyCare, YouthCare, PilchConnect, Aid to the Church in Need, the Green Institute and the Australian Conservation Foundation.

1.9 A public hearing was held on 3 September 2012 at Parliament House in Canberra. A list of witnesses who gave evidence at the hearing is in Appendix 2. The Senate Community Affairs Legislation Committee held its public hearing the following day. The following witnesses appeared before both committees: Treasury, the Department of the Prime Minister and Cabinet, the Australian Charities and Not-for-profit Implementation Taskforce, the Not-for-Profit Reform Council, the Community Council for Australia and World Vision.

Acknowledgements

1.10 The committee thanks those organisations and individuals who made submissions to the inquiry, and those who gave evidence at the public hearing. It is mindful of the abridged timeframe for this inquiry and is grateful to all those who participated at short notice. It is particularly thankful to those witnesses who gave evidence to both committees (see paragraph 1.9).

1.11 The committee also thanks Mr David Crosbie for his willingness to give evidence on the day of his father's funeral. Mr Crosbie is the Chief Executive Officer of the Community Council for Australia, which represents a number of high profile not-for-profit organisations. The committee recognises his significant contribution to the reform process and to the not for profit sector generally.

Note on references

1.12 The references in this report to submissions are to individual submissions as received by the committee, not to a bound volume. References to Committee Hansard are to the proof Hansard transcripts available on the Parliamentary website. Please note that page numbers may vary between the proof and official Hansard.

1 See Senate Community Affairs Legislation Committee, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/charities_commission/submissions.htm (accessed 5 September 2012).

Overview of the not-for-profit sector

1.13 In its seminal 2010 report into the contribution of the not for profit sector, the Productivity Commission (PC) found that there are approximately 600 000 not-for-profit organisations operating in Australia.² This figure excludes body corporates such as strata titles. Approximately 440 000 are small unincorporated organisations, and 58 779 have an 'active tax' profile through employing staff or accessing tax concessions. The PC also noted that not-for-profit organisations are significantly underpinned by volunteer staffing arrangements.³ The report highlighted the diversity of the not-for-profit sector, which encompasses a broad spectrum of entities and service areas including charities, churches and religious organisations, advocacy groups, medical research organisations, educational organisations, animal protection and welfare organisations, labour unions and cooperative schemes.⁴

1.14 Statistical analysis provided by the Australian Charities and Not-for-profits Commission Implementation Taskforce aligns with the PC's findings:

- Australia's NFP sector is large and diverse (around 600 000 entities) which serves the community in a range of economic, social, cultural and environmental areas.
- Of these, around 60 000 are charities (21 000 with DGR [deductible gift recipient] status as at July 2011).
- About 5000 of these charities are constituted as companies limited by guarantee.
- About 136 000 NFP incorporated associations were registered with State and Territory governments in Australia in the 2008–09 financial year.
- About 440 000 organisations are small unincorporated NFPs.⁵

1.15 As the statistics provided by the PC and the Australian Charities and Not for Profits Implementation Taskforce indicate, there is significant diversity in the constitution and formation of not-for-profit entities. Approximately 11 000 not-for-profit entities (including 5000 charities) are incorporated as companies limited by guarantee under the *Corporations Act 2001*.⁶ Not-for-profit entities may adopt other

2 Productivity Commission, *Contribution of the not for profit sector*, January 2010, p. xxiii.

3 Productivity Commission, *Contribution of the not for profit sector*, January 2010, p. xxvi.

4 Productivity Commission, *Contribution of the not for profit sector*, January 2010, p. xxvii.

5 Australian Charities and Not-for-profits Commission Implementation Taskforce, *Key Statistics*, <http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=statistics.htm> (accessed 30 August 2012).

6 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraph 1.25.

company structures regulated under the Corporations Act,⁷ however, ASIC has advised that 'company limited by guarantee' is the prevalent form of incorporation for charities and not-for-profit entities.⁸ Alternatively, not-for-profit entities may operate as incorporated associations under State and Territory legislation.⁹

1.16 At present, the regulation of the not-for-profit sector is fragmented both across jurisdictional boundaries and at the federal level:

- The Australian Taxation Office (ATO) regulates not-for-profit entities' access to tax concessions including income tax exemptions, deductible gift recipient status and fringe benefit tax.¹⁰ As Treasury has noted, this effectively positions the ATO as the regulator that determines whether an entity is a charity.¹¹
- Not-for-profit entities that adopt a company structure must report to ASIC and fulfil their obligations under the *Corporations Act 2001*.¹²
- Indigenous corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* are regulated by the Office of the Registrar of Indigenous Corporations.¹³

7 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraph 1.25.

8 Australian Securities and Investments Commission, *Registering charities and not-for-profit organisations*, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations>, (accessed 30 August 2012).

9 Australian Securities and Investments Commission, *Registering charities and not-for-profit organisations*, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations>, (accessed 30 August 2012).

10 Australian Taxation Office, *Tax concessions – overview – tax basics for not-for-profit organisations*, <http://www.ato.gov.au/nonprofit/content.aspx?doc=/content/33743.htm&mnu=45419&mfp=001/004> (accessed 30 August 2012).

11 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraph 1. 20.

12 Australian Securities and Investments Commission, *Registering charities and not-for-profit organisations*, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations>, (accessed 30 August 2012); Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraphs 1.24–1.26.

13 Office of the Registrar of Indigenous Corporations, *About the Registrar*, <http://www.orac.gov.au/Content.aspx?content=aboutUs/aboutTheRegistrar.htm&menu=about&class=about&selected>About the Registrar> (accessed the August 2012); Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraph 1.727

- At the State and Territory level, each jurisdiction regulates not-for-profit entities that operate as incorporated associations. Not-for-profit organisations are required to comply with State and Territory laws, such as laws relating to fundraising activities.¹⁴

1.17 It has long been recognised that these arrangements have created an onerous reporting burden for the sector, unnecessarily diverting resources from community and related services and making it difficult for the public to connect to the work of NFPs. The case to reform the regulatory framework for the not-for-profit sector was put well in the PC's 2010 report.¹⁵ It stated:

NFPs' compliance costs are minimised when they have to face a single clear set of requirements—whether in regard to registration, tax endorsement or fundraising with common reporting standards and requirements, and where one report satisfies most, if not all, obligations. The public benefits when it can easily access information on an NFP from a trustworthy source, as do philanthropists and government agencies. The challenge is to provide a regulatory system that offers these advantages, but that is proportionate to the risks posed by different types of NFPs.¹⁶

The bills and the report structure

1.18 Chapter 2 of this report examines the provisions of, and submitter views on the ACNC Bill. The bill establishes the ACNC as the Commonwealth regulator of the not-for-profit sector. It also confers on the Commission and, in particular, the Australian Charities and Not-for-profits Commissioner, administrative and enforcement powers underpinned by offences and administrative sanctions that would apply to not-for-profit entities registered with the Commission.

1.19 The Explanatory Memorandum to the ACNC Bill notes that the ACNC is intended to operate as a 'one-stop shop' for not-for-profit entities accessing Commonwealth services and concessions. As a portal to Commonwealth services and benefits, it is intended that the introduction of a single Commonwealth regulator will increase efficiencies for the not-for-profit sector by minimising regulatory duplication.¹⁷ The ACNC Bill provides that the new regulator will be established on 1 October 2012.

14 Further detail is provided in Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraphs 1.28.

15 The committee thanks the Chair of the Not-for-profit Reform Council, Ms Linda Lavarch, for drawing its attention to this quote. *Proof Committee Hansard*, 3 September 2012, p. 15.

16 Productivity Commission, *Contribution of the not for profit sector*, January 2010, p. 115.

17 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, p. 4.

1.20 Chapter 3 of this report examines the provisions of, and views on, the Consequential and Transitional Bill. This bill proposes to amend 34 Commonwealth Acts to support the operation of the ACNC and ensures there is no duplication of responsibilities between agencies. It also contains transitional provisions designed to assist not-for-profit entities to adjust smoothly to the new national regulatory framework.

1.21 Neither the ACNC Bill nor the Consequential and Transitional Bill contain details on the governance standards and reporting requirements that the Commission will require of not-for-profit entities. These details will be set out in the regulations and will come into effect on 1 July 2013. The government has planned an extensive consultation process with the sector on these governance and reporting arrangements. Following 1 October 2012, the ACNC will play a key role in these negotiations.

1.22 Chapter 4 of the report outlines the provisions and the purpose of the TLAB. This bill has also been referred to as the 'In Australia' bill:

- it restates the 'in Australia' special conditions for income tax exempt entities by ensuring that they generally must be operated 'principally' in Australia and for the broad benefit of the Australian community;
- it codifies the 'in Australia' special conditions for DGRs, ensuring they must generally operate solely in Australia and pursue their purposes solely in Australia. Overseas aid funds and some environmental organisations are exempted from this provision; and
- it introduces a consistent definition of a 'not-for-profit entity' throughout the tax laws.

1.23 Chapter 4 notes that while there has been some anxiety about the changes in the tax bill, the amendments essentially restore income tax exemption arrangements for the not-for-profit sector as they existed prior to a 2008 High Court decision.¹⁸

18 *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* [2008] HCA 55.

Chapter 2

Australian Charities and Not-for-profits Commission Bill 2012

2.1 This chapter considers the provisions of the Australian Charities and Not-for-profits Commission Bill 2012 (the ACNC Bill). It is divided into the following sections:

- past inquiries into the not for profit sector that have recommended a national regulator;
- stakeholder consultations on the ACNC Bill including the recent inquiry by the House of Representatives Standing Committee on Economics (the House Committee) into the draft legislation;
- the provisions of the bill in its current form; and
- stakeholders' views on the bill, particularly the overwhelming support for a national regulatory system and the passing of the bills, but also various concerns with certain provisions.

Background to the bill

2.2 The ACNC Bill and the Australian Charities and Not-for-profits (Consequential and Transitional) Bill 2012 draw on successive reviews of the not-for-profit sector. Over the past two decades, several substantive inquiries have been conducted into the not-for-profit sector. These include the:

- 1995 Industry Commission inquiry report *Charitable organisations in Australia*;
- 2001 Committee for the Inquiry into the Definition of Charities and Related Organisations inquiry—*Report of the inquiry into the definition of charities are related organisations*;
- 2008 Senate Economics References Committee's *Inquiry into the disclosure regimes for charities and not-for-profit organisations*;
- 2010 Review into Australia's future tax system;
- 2010 Productivity Commission's inquiry report *Contribution of the not-for-profit sector*;
- 2010 Senate Economics Legislation Committee's *Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010*; and
- 2011 Senate Economics References Committee inquiry report *Investing for good; the development of a capital market for the not-for-profit sector in Australia*.

2.3 These inquiries have all emphasised that the not-for-profit sector would benefit from national regulation. The 2001 *Report of the inquiry into the definition of charities and related organisations* recommended a national administrative framework for the not-for-profit sector. The 2008 Senate Economics Committee report and the three 2010 reports all recommended the establishment of a national regulator for the not-for-profit sector.¹

2.4 On 10 May 2011, as part of its budget proposals, the government announced that it would form a national charities and not-for-profits regulator. It was envisaged that the Australian Charities and Not-for-profits Commission (the ACNC) 'will initially be responsible for determining the legal status of groups seeking charitable, public benevolent institution, and other NFP benefits on behalf of all Commonwealth agencies'. Further, the government announced that the ACNC will operate 'a "report-once use-often" reporting framework for charities, provide education and support to the sector on technical matters, and establish a public information portal by 1 July 2013'. The ACNC will be an independent statutory agency and will report to the Assistant Treasurer.²

2.5 The government has allocated \$53.6 million over four years for the implementation of the ACNC and the consequent structural changes to the ATO. It is estimated that the introduction of a national charities and not-for-profits regulator would have the following fiscal impact:

Figure 2.1: Fiscal impact of the establishment of the ACNC³

	2010–11	2011–12	2012–13	2013–14	2014–15
Australian Taxation Office (\$M)	0.0	+9.6	+23.9	+10.0	+10.1
ATO – administered revenue	0.0	+8.0	+10.0	+10.0	+13.0

2.6 The federal government has recognised that state and territory legislation may operate concurrently with the proposed federal regime. It has announced its intention

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- 1 Explanatory Memorandum, Australian Charities and Not-for-Profits Commission Bill 2012, paragraph 1.31–1.38.
 - 2 The Hon Bill Shorten MP, Minister for Financial Services and Superannuation, the Hon Tanya Plibersek MP, Minister for Human Services and Social Inclusion, 'Making it easier for charities to help those who need it', *Media release 077*, 10 May 2011.
 - 3 Australian Charities and Not for-Profits Commission Implementation Taskforce, *About*, <http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=about.htm> (accessed 31 August 2012).

to work with the states and territories through the Council of Australian Governments (COAG) to achieve national coordination.⁴

2.7 On 13 April 2012, COAG agreed to establish a Not-for-profit Reform Working Group to advise COAG on regulatory reform options including:

- the adoption or application of a Commonwealth statutory definition of charity;
- a nationally consistent approach to fundraising regulation;
- legal, governance and reporting regulations for the not-for-profit sector; and
- approaches to harmonise the test for determining the non-charitable activities of charities.⁵

2.8 In July 2012, COAG reaffirmed its commitment to reducing regulatory compliance costs for the not-for-profit sector. However, it did not finalise recommendations for reform, instead requesting additional advice on reform options.⁶

Stakeholder consultations

2.9 On 21 January 2011, the government released a consultation paper *Scoping Study for a National NFP Regulator*. It sought public comment by 25 February 2011.⁷ Over 160 submissions were received.⁸ Exposure draft legislation was released for public comment on 9 December 2011.⁹ The initial 42 day consultation period, which included the Christmas and New Year break, was extended to 27 January 2012.¹⁰ This was followed by targeted consultations on revised draft legislation in May 2012 with

4 The Hon Bill Shorten MP, Minister for Financial Services and Superannuation, the Hon Tanya Plibersek MP, Minister for Human Services and Social Inclusion, 'Making it easier for charities to help those who need it', *Media release 077*, 10 May 2011.

5 Council of Australian Governments, *Communiqué 13 April 2012*, <http://www.coag.gov.au/node/313> (accessed the August 2012).

6 Council of Australian Governments, *Communiqué 25 July 2012*, <http://www.coag.gov.au/node/431> (accessed the August 2012).

7 Treasury, *Consultation Paper – Scoping study for a national NFP regulator*, <http://archive.treasury.gov.au/contentitem.asp?ContentID=1934> (accessed 31 August 2012).

8 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, paragraph 1.63.

9 Treasury, *Exposure draft – Australian Charities and Not-for-profits Commission Bill*, <http://archive.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2263> (accessed 31 August 2012).

10 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, paragraph 1.64.

select representatives of the not-for-profit sector including the Charities Consultative Committee, the Clubs Consultative Forum and the NFP Sector Reform Council.¹¹

2.10 To support the establishment of the ACNC, in July 2011 the government established the Australian Charities and Not for Profits Commission Implementation Taskforce. This taskforce, chaired by Ms Susan Pascoe AM, is responsible for stakeholder consultations regarding the implementation framework for the ACNC.¹² These consultations have included a series of forums attended by approximately 1600 people.¹³

House of Representatives Economics Committee's review of exposure draft bills

2.11 In July 2012, the House Committee was referred the exposure drafts of the ACNC Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012. The House Committee sought to 'investigate the adequacy of the bills in achieving policy objectives and, where possible, identify any unintended consequences'.¹⁴ Its inquiry focused on three broad policy areas: namely, the capacity of the ACNC to reduce red tape; the liability of directors, trustees and management committees for the conduct of not-for-profit entities; and procedural fairness.¹⁵

2.12 The House Committee reported in August 2012. It was largely supportive of the bills, concluding that '[t]he Bills should pass'.¹⁶ However, the committee argued there was scope to refine the technical details of the bills and the accompanying the Explanatory Memorandum (EM). The committee's 11 recommendations, and the government's response to each, are listed in Appendix 3.

11 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, paragraph 1. 68.

12 Australian Charities and Not for-profits Commission Implementation Taskforce, *About*, <http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=about.htm> (accessed 31 August 2012).

13 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, paragraph 1.69.

14 House of Representatives Standing Committee on Economics, *Report on the exposure draft of the Australian Charities and Not-for-profits Commission Bills 2012*, August 2012, paragraph 1.119.

15 A summary of the committee's findings against each broad policy area is provided in paragraphs 2.156–2.159 of the committee's report.

16 House of Representatives Standing Committee on Economics, *Report on the exposure draft of the Australian Charities and Not-for-profits Commission Bills 2012*, p. iv.

Committee view

2.13 The committee (the PJC) commends the work of the House Committee in reviewing the exposure drafts of the bills. As Appendix 3 shows, the government adopted the recommendations of the House of Representatives Economics Committee. The PJC's particular interest as part of this inquiry is to elicit stakeholders' support for these amendments to the exposure draft.

Provisions of the ACNC Bill

2.14 The Australian Charities and Not-for-profits Commission Bill 2012 would establish the ACNC to establish and maintain a register of not-for-profit entities.¹⁷ The provisions of the bill would commence at the later of 1 October 2012 or the day the Australian Charities and Not-For-Profits Commission (Consequential and Transitional) Bill 2012, if passed, receives Royal Assent.¹⁸

Objects of the Act

2.15 Proposed section 15-5, Division 15, Part 1-2 would establish objects for the ACNC legislation. The objects specify that it is intended that the establishment of a national regulatory framework overseen by the ACNC will:

- maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector;
- support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- promote the reduction of unnecessary regulatory duplication applying to the Australian not-for-profit sector.

Interaction with other Commonwealth legislation

2.16 The objects clause, proposed section 15-5, makes clear that is intended that registration with the ACNC will be required for not-for-profit entities to access 'certain Commonwealth tax concessions' and other exemptions, benefits and concessions.¹⁹ This intention is confirmed in proposed section 20-5, which would outline the objects of registration of not-for-profit entities. Accordingly, while

17 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, p. 7.

18 Proposed section 5-10, Australian Charities and Not-for-profits Commission Bill 2012.

19 Proposed subsections 5-10(3)-(4), Australian Charities and Not-for-profits Commission Bill 2012.

registration is voluntary it is necessary in order to obtain and, for some entities, retain tax concessions.²⁰

Registration of not-for-profit entities

2.17 Chapter 2 of the bill would establish the parameters under which an entity may be registered with the ACNC. An entity may be registered if it:

- is a not-for-profit entity;
- is compliant with governance standards and external conduct standards;
- has an Australian Business Number (ABN); and
- has not been determined by an Australian government agency that the entity has engaged in or supports terrorist, or other criminal, activities under Australian law.²¹

2.18 The committee notes that a definition of 'not-for-profit entity' is not included in the Dictionary in Part 8-2 of the bill, or in Part 8-1 which defines concepts central to the bill. The dictionary also does not include a note to guide the reader to where the definition is located in the bill. The EM provides the following explanation of not-for-profit entity:

A NFP entity is generally an entity that is not operating for the profit or gain of its individual members, whether these gains are direct or indirect. This applies both while the entity is operating and when an entity winds up.

Additionally, a NFP entity is one that does not provide any private benefit, directly or indirectly, to related parties such as a trustee, member, director, employee, agent or officer of a trustee, donor, founder, or to an associate of any of these entities (other than reasonable remuneration of the services provided or reimbursement of related costs).

However, the fact that a NFP entity may make a profit does not negate its NFP status so long as any surplus is applied to the NFP purposes of the entity and profit does not accrue to the benefit of identifiable members either directly or indirectly.²²

2.19 In addition, the entity must operate as a 'charity'. While not directly defined, the bill lists seven subcategories of 'charity':

- an entity with a purpose that is the relief of poverty, sickness or the needs of the aged;

20 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraph 3.10.

21 Proposed subsection 25-5(3), Australian Charities and Not-for-profits Commission Bill 2012.

22 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraphs 3.33–3.35.

- an entity with a purpose that is the advancement of education;
- an entity with the purpose that is the advancement of religion;
- an entity with another purpose that is beneficial to the community;
- an institution whose principal activity is to promote the prevention or the control of diseases in human beings;
- a public benevolent institution; and
- an entity with a charitable purpose described in section 4 of the *Extension of Charitable Purposes Act 2004* (provision of childcare services).²³

2.20 The EM to the bill notes that initially, only charities may be registered. However, 'the bill establishes a regulatory framework that can be extended to all NFP entities in the future'.²⁴

2.21 The bill would require entities to apply, in the unspecified 'approved form', to the Commissioner of the ACNC for registration.²⁵ The Commissioner would have 60 days in which to consider the application, and an additional 28 days if requesting further information.²⁶ The bill does not expressly provide applicants the right to withdraw their application. However, if the Commissioner has not considered the application within the allowable timeframe, the entity may notify the ACNC that the entity wishes the application to be treated as having been refused. The EM explains that this is intended to ensure that entities 'have recourse if a decision is not made in the set time and ensures that entities can have the decision reviewed where appropriate'.²⁷

2.22 Where an application satisfies the statutory criteria, the Commissioner would be required to register the entity.²⁸ However, the Commissioner has discretion to revoke registration where s/he reasonably believes that the entity:

- was not entitled to registration when registered;
- provided false or misleading information;
- has or is more likely than not to contravene a provision of the bill when passed;

23 Proposed subsections 25-5(1) and 25-5(5), Australian Charities and Not-for-profits Commission Bill 2012.

24 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, p. 7.

25 Section 30-10, Australian Charities and Not-for-profits Commission Bill 2012.

26 Section 30-15, Australian Charities and Not-for-profits Commission Bill 2012.

27 Explanatory Memorandum, Australian Charities and Not-for-Profits Commission Bill 2012, paragraph 3.75.

28 Proposed section 30-20, Australian Charities and Not-for-profits Commission Bill 2012.

- has or is more likely than not to contravene a governance standard or an external conduct standards;
- the entity has a trustee in bankruptcy or a liquidator; or
- has requested the revocation.

2.23 The bill does not define 'more likely than not'. However, it would require the Commissioner to take account of the nature, significance and persistence of any contravention of statutory requirements, governance standards or external conduct standards.²⁹ The EM argues that there is a high threshold to satisfy before registration could be revoked:

This ground only covers the situation where there is a substantial or significant likelihood of a contravention or non-compliance and would not extend to a situation where there was only a small chance of the contravention or non-compliance occurring.

In determining whether an entity is more likely than not to contravene a provision of this law or is more likely than not to comply with governance standard or external conduct standard, the ACNC Commissioner must have sufficient, reliable and accurate evidence which clearly indicates that there will be a contravention.

A mere suspicion, rumour or possibility of a likely contravention or likely non-compliance is insufficient with a ACNC Commissioner to take action.

In addition, a 'reasonably believes' test needs to be satisfied which ensures that the ACNC Commissioner will only revoke registration for likely contraventions where a reasonable individual, provided with a set of information available to the ACNC Commissioner, would conclude that it is more likely than not that a registered entity will contravene a provision of the Bill.³⁰

2.24 Decisions of the ACNC Commissioner regarding registration and revocation of registration may be appealed to the Commissioner and, subsequently, to the Administrative Appeals Tribunal.³¹

The Australian Charities and Not-for-profits Register

2.25 The bill would authorise the creation of an Australian Charities and Not-for-profits Register maintained by the ACNC.³² The register would be available for public access and would disclose details of the names, contact details, ABN, charity type,

29 Proposed section 35-10, Australian Charities and Not-for-profits Commission Bill 2012.

30 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraphs 3.89-3.93.

31 Proposed section 30-35; proposed section 35-20, Australian Charities and Not-for-Profits Commission Bill 2012.

32 Division 40, Part 2, Australian Charities and Not-for-profits Commission Bill 2012.

date of registration, and the governing rules of each registered entity. The register would also disclose the information statements provided by registered entities, with the exception of any information classified as not-for-publication, and financial reports and audit reviews provided to the ACNC. It would contain information potentially adverse to an entity, including warnings and directions issued by the Commissioner, enforceable undertakings, injunctions, and suspensions and removals from the register.³³ The bill would also authorise subordinate legislation to restrict the kinds of information that may be included on the register.³⁴

Record keeping and reporting obligations

2.26 The bill would also impose recordkeeping and reporting obligations on registered entities. Registered entities would be required to keep written, readily accessible financial records and records that correctly outline its operations.³⁵ Failure to do so would be a strict liability offence.³⁶ The EM provides the following definition of strict liability:

Strict liability is a legal responsibility for damages, or injury, even if the person found strictly liable was not at fault or negligent.³⁷

2.27 This definition departs from the definition of strict liability in the Criminal Code. As outlined in section 6.1 of the Criminal Code, a strict liability offence does not contain any fault elements (intention, knowledge, or recklessness). A person commits the offence if undertaking the prohibited physical activity regardless of whether the person did so intentionally, knowingly or recklessly.³⁸ Commonwealth criminal law policy dictates that strict liability offences should be used only in limited circumstances:

The requirement for proof of fault is one of the most fundamental protections in criminal law. This reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).

The application of strict and absolute liability negates the requirement to prove fault (sections 6.1 and 6.2 of the Criminal Code). Consequently, strict and absolute liability should only be used in limited circumstances, and

33 Proposed section 40-5, Australian Charities and Not-for-profits Commission Bill 2012.

34 Proposed section 40-10, Australian Charities and Not-for-profits Commission Bill 2012.

35 Proposed section 55-5, Australian Charities and Not-for-profits Commission Bill 2012.

36 Proposed subsection 55-5(6)-(7), Australian Charities and Not-for-profits Commission Bill 2012.

37 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraph 6.19.

38 Section 6.1, the Criminal Code.

where there is adequate justification for doing so. This justification should be carefully outlined in the explanatory material.³⁹

2.28 The EM provides the following justification for imposing a strict liability offence to regulate the record-keeping practices of registered not-for-profit entities:

The use of strict liability penalties is consistent with the Commonwealth guide for framing offences. Strict liability penalties provide a strong incentive to adopt measures to comply with the requirements. In this case, imposing strict liability is an effective way of ensuring compliance with an obligation to keep financial records.⁴⁰

2.29 In contrast, administrative penalties would apply to registered entities that failed to meet the reporting obligations under proposed Division 60 of the bill. Registered entities would be required to provide annual information statements, annual financial reports audited by an approved auditor, and additional information where required by the ACNC Commissioner.

2.30 The bill would impose a graduated reporting framework under which reporting obligations would differ between small entities, medium entities, and large entities. Small registered entities would be classified as an entity with annual revenue of less than \$250 000; medium registered entities would be those with annual revenue of greater than \$250 000 but less than \$1 million; and large registered entities would be those with annual revenue of \$1 million or more.⁴¹ Treasury advised that 'the majority of entities will fall within the small tier'.⁴²

Figure 2.2: Small, medium, and large entities

Tier	Charity population %	Cumulative total %
Small registered entity Revenue up to \$250 000	78	78
Medium registered entity Revenue between \$250 000 and \$1 million	11	89
Large registered entity Revenue greater than \$1 million	11	100

Source: Treasury, *Submission 31*, p. 10.

39 Commonwealth Attorney-General's Department, *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, September 2011, p. 22.

40 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraph 6.20.

41 Clause 205-25, Australian Charities and Not-for-profits Commission Bill 2012.

42 Treasury, *Submission 31*, p. 10.

2.31 While all registered entities would be required to provide annual information statements in the approved form, Treasury advised that the ACNC Commissioner would have the discretion to issue separate forms for small, medium, and large registered entities.⁴³ Similarly, small entities would not be required to provide financial reports, medium entities would be required to provide financial reports that can be reviewed, while large entities would be required to provide audited financial reports.⁴⁴

2.32 In addition, registered entities would be required to notify the ACNC Commissioner of changes to details affecting their registration, including any instances of the entity failing to comply with governance standards.⁴⁵ Failure to notify the ACNC Commissioner would be subject to an administrative penalty.

Governance standards and external conduct standards

2.33 The bill would also impose on registered entities obligations to comply with governance standards and external conduct standards.⁴⁶ In proposed section 45-5, the bill states that the purpose of introducing governance standards is to 'give the public confidence that registered entities manage their affairs openly, accountably and transparently, use their resources effectively and efficiently, minimise the risk of mismanagement and misappropriation, and pursue their purposes'. The governance standards will be contained in regulations.⁴⁷

2.34 The bill would also introduce external conduct standards to govern the activities of registered entities. Proposed section 50-5 of the bill notes that external conduct standards are intended to 'give the public confidence that funds sent outside Australia by registered entities are reaching legitimate beneficiaries, being used for legitimate purposes, and not contributing to terrorist or other criminal activities'. Treasury advised that the standards are expected to be modelled on the Financial Action Task Force's Recommendation 8.⁴⁸

Information gathering, monitoring and enforcement powers

2.35 The bill would also confer on the ACNC powers to compel the production of documents and other information, and powers to monitor the operations of registered

43 Treasury, *Submission 31*, pp 9–10.

44 Treasury, *Submission 31*, p. 9.

45 Division 65, Australian Charities and Not-for-profits Commission Bill 2012.

46 Part 3-1, Australian Charities and Not-for-profits Commission Bill 2012.

47 Clause 45-10, Australian Charities and Not-for-profits Commission Bill 2012.

48 Treasury, *Submission 31*, p. 8. Further information regarding Recommendation 8 is provided in Chapter 3 of this report.

entities.⁴⁹ The EM provides the following rationale for the entry, search and seizure powers:

For the NFP sector's regulatory framework to function and remain effective the ACNC needs to be able to access the latest available information through appropriate information gathering and monitoring powers.

Without these powers the ACNC would be unable to gather information beyond that contained in information statements and financial reports, and would be unable to investigate fraud and whether public funds are being used to promote charitable purposes.⁵⁰

2.36 The proposed powers include issuing notices requiring an entity to provide the Commissioner documentation, or to attend and give evidence before the Commissioner. An entity would commit an offence subject to 20 penalty units for failing to comply with such a directive.⁵¹

Enforcement powers administrative sanctions

2.37 In addition to criminal sanctions, registered entities would be liable to administrative sanctions and to a broad range of enforcement powers available to the ACNC Commissioner.⁵² The enforcement options available to the ACNC Commissioner include written directions regarding the conduct of the organisation and individuals within the organisation.⁵³ The bill specifies that the enforcement options may only be exercised in relation to 'federally regulated entities'.⁵⁴ Other enforcement options include the issuance of enforceable undertakings.⁵⁵

2.38 Part 7-3 of the bill would also impose administrative penalties on registered entities for providing false or misleading statements to the ACNC Commissioner. As the penalty is not a criminal sanction, a registered entity may be subject to an administrative penalty regardless of whether the entity intentionally, knowingly or recklessly provided false or misleading information.

49 Part 4-1, Australian Charities and Not-for-profits Commission Bill 2012.

50 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraphs 8.7–8.8.

51 Proposed section 70-5, Australian Charities and Not-for-profits Commission Bill 2012.

52 Part 4-2, Australian Charities and Not-for-profits Commission Bill 2012.

53 Proposed sections 85-5 and 85-10, Australian Charities and Not-for-Profits Commission Bill 2012.

54 Proposed section 85-1, Australian Charities and Not-for-profits Commission Bill 2012.

55 Division 90, Australian Charities and Not-for-profits Commission Bill 2012.

Support for the ACNC and the ACNC Bill

2.39 There is strong support within the not-for-profit sector for national regulation. The diverse sector is essentially united in its support for a national regulatory system. The introduction of the ACNC is supported by animal welfare groups,⁵⁶ social welfare organisations,⁵⁷ healthcare providers,⁵⁸ international aid organisations⁵⁹ and religious entities.⁶⁰

2.40 The Australian Council of Social Services noted in its submission that the sector has 'long championed' the introduction of a national not-for-profit regulator.⁶¹ Indeed, the Department of the Prime Minister and Cabinet has argued that the establishment of the ACNC is the result of the sector's long-term advocacy for national regulatory consistency.⁶²

2.41 The strength of the sector's support for a national regulatory system is also reflected in some concern that this opportunity must not be missed. As the National Roundtable of Nonprofit Organisations stated in its submission:

[t]here are now more than 12 million words on 39 000 pages on the public record in the case for and the nature of necessary and desirable not-for-profit regulatory reform in Australia. Once again, we are at the altar of the reforms we want and need and we ask the support of the national parliament and of the states and territories to deliver for us better and smarter regulation. We do not want to be jilted yet again.⁶³

2.42 There is an expectation across the sector that the proposed national regulation will increase administrative efficiencies and, accordingly, the operational effectiveness of not-for-profit organisations. The Community Council for Australia submitted that 'over time the proposed ACNC will significantly reduce redtape, duplication and compliance costs'.⁶⁴ Mission Australia emphasised that these benefits were the basis of its support for national regulation:

56 RSPCA, *Submission 46*, p. 1.

57 See, for example, Anglicare Sydney, *Submission 32*, p. 2.

58 See, for example, Catholic Health Australia, *Submission 20*, p. 1.

59 See, for example, Australian Council for International Development, *Submission 41*, p. 4.

60 See, for example, Anglican Church Dioceses of Sydney, *Submission 28*, p. 1.

61 Australian Council of Social Services, *Submission 10*, p. 1.

62 Department of the Prime Minister and Cabinet, *Submission 43*, p. 1. See, for example, The Smith Family, *Submission 1*, p. 2.

63 National Roundtable of Nonprofit Organisations, *Submission 14*, p. 3.

64 Community Council for Australia, *Submission 11*, p. 1.

We strongly support the removal of this [regulatory] duplication and our support for the ACNC has been largely predicated around reducing this compliance burden.⁶⁵

2.43 Several submitters argued that national reform is necessary to ensure the ongoing effectiveness of the not-for-profit sector. They claimed the reforms are necessary to promote the sector's 'long-term sustainability'⁶⁶ and 'vibrant operation'.⁶⁷ The Institute of Chartered Accountants Australia (ICAA) noted the capacity for national regulation to improve the sector's operation, stating it is 'very supportive of the regulator approach to improving the operation of the charity sector'.⁶⁸ Philanthropy Australia highlighted the sector's expectation that national regulation will encourage increased transparency:

[W]e strongly support the principles of an independent and dedicated regulator to deliver smarter regulation, reduce redtape and improve transparency and accountability within the sector.⁶⁹

2.44 The outcome of greater transparency was also the focus of the Not-For-Profit Sector Reform Council. As the Chair of the Council, Ms Linda Lavarch told the committee:

[t]he benefit of having a national regulator runs at a number of levels. At its highest and most conceptual level, it is about having a national focus on the potential to overcome the state and territory overlays of regulation that bedevil us in our federal system...The next layer is in relation to the public trust and confidence in the sector, and in my view that comes from accountability and transparency. If a large portion of the sector is totally unregulated, then it could well be argued that that is a huge potential for a devastating breach of public trust and confidence.⁷⁰

2.45 Submitters to this inquiry contrasted the expected benefits from a national regulator with the shortcomings of the current system of disparate Commonwealth, state and territory regulations. As Mr David Ward of Philanthropy Australia told the committee:

The current arrangements are so fragmented that the commencement of reform is absolutely needed...I am on a small not-for-profit run by

65 Mission Australia, *Submission 12*, p. 4.

66 Not-For-Profit Sector Reform Council, *Submission 39*, Attachment A, p. 4.

67 World Vision Australia, *Submission 29*, p. 1.

68 Ms Kerry Hicks, Head of Reporting, Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 3 September 2012, p. 31.

69 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 18.

70 Ms Linda Lavarch, Chair, Not-For-Profit Sector Reform Council, *Proof Committee Hansard*, 3 September 2012, p. 17.

volunteer boards which was volunteers only up until recently. It is required to produce audited financial statements, has ASIC reporting requirements, has ATO reporting requirements, is technically regulated by one state attorney-general, has six state fundraising licences and files information to seven separate agencies.

At the other extreme there are charitable funds, claiming in excess of \$1 million franking credit refunds annually, in cash, from the ATO—totally legitimately, I would add—which are currently not required to produce financial statements, which are not audited and which report to no-one.

In our view, neither of these examples is satisfactory.⁷¹

Concerns with certain provisions

2.46 Submitters to this inquiry overwhelmingly supported the passing of the bills.⁷² However, some submitters argued that improvements could and should be made to the legislation.⁷³ These proposals related to the following issues:

- the fragmentation within a national system;
- the enforcement powers of the ACNC;
- the definition of a 'basic religious charity';
- the definitions of small, medium and large registered entities;
- directors' liabilities;
- the reporting thresholds; and
- the operational independence of the ACNC from the ATO.

Fragmentation within a national system

2.47 A number of submitters questioned whether the proposed legislation would produce a streamlined, cross-jurisdictional regulatory framework. Their argument was that the legislation in itself will not achieve this outcome. Rather, the optimal regulatory system will depend on the agreements reached between the Commonwealth government and the state and territory governments. This issue is also considered in chapter 3 of this report.

2.48 Several submitters argued that substantial work is required to ensure a truly national system. Anglicare Sydney, for example, noted that cross-jurisdictional regulatory harmonisation will require 'a lengthy transition period'.⁷⁴ UnitingCare

71 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 18.

72 See, for example, Mr Ward, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 1; The Smith Family, *Submission 1*, p 3; YWCA Australia, *Submission 8*, p. 2.

73 See UnitingCare Australia, *Submission 4*, p. 3; The Smith Family, *Submission 1*, p. 3.

74 Anglicare Sydney, *Submission 32*, p. 4.

Australia commented that the COAG process entails 'complex and lengthy negotiations'.⁷⁵ YWCA Australia argued in its submission:

[M]uch work will need to be done to ensure that the object of reducing red tape and streamlining regulation is achieved. We look forward to the Australian government and state and territory governments working together to achieve a truly one-stop shop for the sector...⁷⁶

2.49 Philanthropy Australia told the committee that creating the ACNC is an important (but incomplete) step towards creating a single national framework. Mr Ward told the committee that the goal of this single framework:

...will not be fixed overnight with the creation of the ACNC. However, we believe it is the best chance of being fixed. Before the states even consider referring responsibilities, there must be an authority to refer its responsibilities to.⁷⁷

2.50 A different view was put by the Australian Catholic Bishops Conference. It argued that in the absence of agreements with the states and territories, the ACNC legislation will increase the regulatory burden on the sector. The Conference called on the government to obtain a commitment from the states and territories on a national system.⁷⁸ Its concerns were shared by Mission Australia, which also called for 'more concrete evidence' to demonstrate that the establishment of the ACNC will lead to a national system.⁷⁹

2.51 The committee was informed that Treasury and the ACNC will work closely with the states and territories as the ACNC framework is implemented.⁸⁰ The Department of Prime Minister and Cabinet confirmed that jurisdictional collaboration is continuing, with jurisdictions agreeing to several work programs to ensure a coordinated regulatory approach.⁸¹

The enforcement powers of the ACNC

2.52 The committee received evidence that the proposed regulatory powers of the ACNC are inappropriate and beyond what is required to effectively regulate the sector. World Vision Australia submitted that 'the tone and structure of the

75 UnitingCare Australia, *Submission 4*, p. 5.

76 YWCA Australia, *Submission 8*, p. 2.

77 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 18.

78 Australian Catholic Bishops Conference, *Submission 17*, p. 8.

79 Mission Australia, *Submission 12*, p. 4.

80 Mr Paul Ronalds, First Assistant Secretary, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 3 September 2012, p. 7.

81 Department of the Prime Minister and Cabinet, *Submission 43*, p. 4.

enforcement powers continue to suggest a heavy-handed approach weighted against the interest of registered entities and responsible entities'.⁸² Similarly, the Fundraising Institute Australia argued that 'the Bill emphasises the investigation of NFPs and enforcement of compliance with the Bill by criminal sanctions, rather than risk management and education for charities and NFPs'.⁸³ Drawing on research undertaken by the Australian and New Zealand Standard of Risk Management, the Institute advocated that the ACNC prioritise sector support and education, rather than a punitive enforcement approach:

Less than half the survey participants have had risk management identification and training. This fact indicates an area where the ACNC has the opportunity to provide practical guidance and assistance, in particular to smaller, under-resourced NFPs, who would benefit from risk management guidance being included in the ACNC information portal and possibly other education programs as well. An educational focus is more appropriate than an enforcement focus, as the survey showed that smaller NFPs pay less attention to formal risk management policy and practices because of budgetary constraints, rather than ignorance of compliance issues.⁸⁴

2.53 Anglicare Sydney expressed its concern that the powers 'appear to be more far-reaching than necessary', and in excess of those currently exercised by the ATO.⁸⁵ It stated:

[I]t is unclear to Anglicare Sydney what current situations in the sector justify the need for this degree of expansion, particularly in the light of Treasury's previously stated assumption that "charities operate for charitable purposes, and overwhelmingly most aim to comply with their regulatory requirements".⁸⁶

2.54 Treasury told the committee that the proposed enforcement powers are appropriate. It noted that the bill's powers and sanctions are modelled on those available to regulators, including the ATO and the Australian Securities and Investments Commission (ASIC), that currently oversee entities in the NFP sector. Treasury argued that continuity between existing enforcement powers and those proposed for the ACNC is required to ensure the successful implementation of a national, coordinated regulatory system:

Ensuring the ACNC has similar regulatory powers is essential for the ACNC to effectively take on the regulatory roles previously performed by these other regulators. Without the necessary powers the ACNC would not

82 World Vision Australia, *Submission 29*, p. 15.

83 Fundraising Institute Australia, *Submission 21*, p. 5.

84 Fundraising Institute Australia, *Submission 21*, pp 5–6.

85 Anglicare Sydney, *Submission 32*, p. 5.

86 Anglicare Sydney, *Submission 32*, p. 5.

be able to take on the roles of these other regulators and therefore function as a one-stop shop regulator for the NFP sector.⁸⁷

2.55 Treasury further advised that it is intended that the ACNC will take a proportional approach in exercising its enforcement powers.⁸⁸ This was confirmed by Ms Pascoe of the ACNC Implementation Taskforce:

...the vast majority of the work that will be done by the new regulator in compliance will be in the areas of education and guidance. In other words, helping charities to meet their obligations. It further illustrates that the regulator has the power to take action for serious misconduct, if necessary. However, education and guidance are the foundations of the ACNC's approach and will play a key role in enabling charities to undertake best practice models.⁸⁹

2.56 While emphasising education, it was also evident that the ACNC will exercise coercive enforcement powers where necessary to deter, or to address, significant non-compliance with statutory requirements:

[T]here is a significant proportion of the bill dedicated to what is likely to be a highly unusual event. I suppose it is the serious fraud and money laundering and the real possibility of the use of a charity for the financing of terrorism. Where there is serious malfeasance, it is enabling some teeth for the regulator to deal with those rare events, which do occur from time to time.⁹⁰

Committee view

2.57 The committee considers that it is appropriate for the ACNC to be invested with powers to monitor and enforce the not-for-profit sector regulatory framework. The committee is satisfied that the proposed powers are appropriate and will facilitate a proportional response to non-compliance with regulatory requirements.

2.58 In relation to ASIC's exercise of its coercive powers, the committee has previously commented that it considers that regulators should exercise powers cautiously, giving due regard to individual rights and ensuring that the most appropriate power is utilised.⁹¹

87 Treasury, answer to question on notice, 3 September 2012 (received 3 September 2012).

88 Treasury, answer to question on notice, 3 September 2012 (received 3 September 2012).

89 Ms Susan Pascoe, Interim Commissioner, Australian Charities and Not-for-profits Commission Implementation Taskforce, *Proof Committee Hansard*, 3 September 2012, p. 3.

90 Ms Susan Pascoe, Interim Commissioner, Australian Charities and Not-for-profits Commission Implementation Taskforce, *Proof Committee Hansard*, 3 September 2012, p. 11.

91 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, August 2011, p. 11.

2.59 The committee commends the graduated enforcement approach and the emphasis on stakeholder education. Educating the sector will be crucial to ensuring the effective transition to the new regulatory system. The committee draws to the ACNC's attention guidance material available on the ASIC website, which ASIC has issued to educate stakeholders on the requirements of Australia's corporations law. The committee also highlights to the ACNC ASIC's *Information Sheet 151*, which details the parameters in which ASIC's enforcement powers will be exercised. This guidance will be particularly useful for incorporated associations, the oversight for which will be transferred from ASIC to the ACNC.

The definition of a basic religious charity

2.60 Several submitters commented on proposed section 60-60 of the ACNC bill providing an exemption for 'basic religious charities' from the annual financial reporting requirements.

2.61 Proposed section 205-35 sets out various conditions to qualify as a 'basic religious charity'. An entity cannot be a basic religious charity if it is a deductible gift recipient or if it receives grants from Australian government agencies in a financial year exceeding \$100 000.⁹² However, the EM does state:

An entity may still be considered a basic religious charity if it operates a fund, authority or institution as a separate entity that is a DGR, where the running of the DGR and all DGR funds are kept separate from the parent entity.⁹³

2.62 An entity cannot be a basic religious charity if it is a body corporate that is registered under the Corporations Act.⁹⁴

2.63 The EM notes that the governance standards will not apply to basic religious entities and the Commissioner cannot remove or suspend a Responsible Entity of a basic religious charity.⁹⁵

2.64 Moore Stephens expressed concern that the exemption does not extend to the lodgement of an annual information statement for a basic religious charity. These proposed information statements currently include financial information. Moore Stephens recommended that basic religious charities should be required to lodge a simplified annual information statement which does not include any financial information. The statement would simply confirm key details held on the ACNC register and a declaration by the religious charity in relation to compliance with the

92 Australian Charities and Not-for-profits Commission Bill 2012, proposed section 205-35, p. 149.

93 *Explanatory Memorandum*, p. 223.

94 Proposed section 205-35(2a).

95 *Explanatory Memorandum*, pgs 61 and 66.

external conduct standards. It argued that this arrangement would ensure that basic religious charities will not have onerous financial reporting obligations.⁹⁶

2.65 Australian Baptist Ministries argued that the bill should not exclude incorporated entities from the definition of a basic religious charity. It noted that at least 100 local Baptist congregations are incorporated associations and would therefore be subject to the annual financial reporting provisions. Australian Baptist Ministries argued that proposed subparagraphs 205-35(2–4) should be removed from the bill.⁹⁷

2.66 The Australian Catholic Bishops Conference argued that the exclusion of entities with DGR status from the definition of a basic religious charity should be reconsidered. The Conference noted in its submission that a large number of parishes have established School Building Funds which been endorsed as DGRs. It added:

The current drafting would mean that the apparently well-intentioned exemption in the Bill will not apply in practice because section 205-35(3) would disentitle such a parish from being a BRC [basic religious charity] simply because it operated a School Building Fund or some other DGR. The effect of Section 205-35(3) will be to increase red tape and the level of reporting above that which currently applies by requiring parishes which operate a School Building Fund to place the School Building Fund into a separate ABN if the parish is to be a BRC.⁹⁸

2.67 The Catholic Bishops Conference noted that in the bill, DGRs with annual revenue less than \$250,000—small entities—are not subject to financial reporting requirements. It proposed that the definition of a basic religious charity should be broadened to include DGRs with annual revenue of less than the threshold for medium registered entities (\$250 000).⁹⁹

2.68 Moore Stephens also recommended broadening the definition of a basic religious charity to include those that meet the small registered entity threshold of less than \$250 000 in revenue in a financial year. It noted that it is 'not unusual for churches or other religious institutions to undertake ancillary activities as part of their advancement of religion.'¹⁰⁰

2.69 The committee asked Treasury whether entities with both non-deductible gift recipient funds and operating a deductible gift recipient (such as a school building fund) can qualify as a basic religious charity. Treasury responded:

96 Moore Stephens, *Submission 30*, p. 8.

97 Australian Baptist Ministries, *Submission 13*, p. 4.

98 Australian Catholic Bishops Conference, *Submission 17*, p. 6.

99 Australian Catholic Bishops Conference, *Submission 17*, p. 7.

100 Moore Stephens, *Submission 30*, p. 10.

...when we put in the basic religious charities exemption and made a carve-out for those that operate DGR funds in house, effectively so that we can monitor them, we referred them back in the EM noting that if you want to retain your basic religious charity exemption you can avail yourself of a concession already existing within the tax law to shift what happens to a DGR fund in house to a DGR fund operated out of house. So there was no need to make amendments to the ACNC Bill or the tax law to give effect to that because it is already an option available within the existing tax law.¹⁰¹

Committee view

2.70 The committee believes that in large measure, the proposed provisions defining a basic religious charity are appropriate to satisfy the government's intent to minimise financial reporting requirements for those entities that meet this definition. However, it understands the anxiety of religious groups about the basic religious charity provisions in the bill and views these as legitimate concerns. Accordingly, the committee believes the bill should be amended to allow an entity that operates a school building fund with DGR status within the entity to be classified as a 'basic religious charity'.

Recommendation 2.1

2.71 The committee recommends that the definition of a basic religious charity in the Australian Charities and Not-for-profits Commission Bill 2012 be modified to enable an entity to retain their current status as a BRC in cases where they operate a school building fund with deductible gift recipient status within the entity. The committee recommends that the bill be amended to this effect.

Directors' liabilities

2.72 Following the recommendation of the House Committee, the government amended Division 180 of the ACNC Bill to remove any criminal liability for directors of incorporated charities. The revised provisions clarify that where there is a non-criminal contravention of the bill, a director of an incorporated charity is only liable for any amount payable by the body corporate where this arises from a deliberate act or omission of the director involving dishonesty, gross negligence or recklessness.¹⁰²

2.73 There was unanimous support for this amendment among those submitters and witnesses that commented on the issue.¹⁰³ Some organisations, however, continued to have some concerns. The Australian Institute of Company Directors

101 Mr Chris Leggett, Manager, Philanthropy and Exemptions Unit, Department of the Treasury *Proof Committee Hansard*, 3 September 2012, p. 9.

102 Treasury, *Submission 31*, p. 22.

103 See Ms Anne Hampshire, Head of Research and Advocacy, The Smith Family, *Proof Committee Hansard*, 3 September 2012, p. 41.

(AICD), notably, argued that while the amendments represent a 'significant improvement' from the draft legislation:

...it is concerning to us that individuals overseeing unincorporated charities will still have the same obligations and will be liable for any and every amount payable by the unincorporated association under the Bill without exception and without access to defences.¹⁰⁴

2.74 AICD's concern is that liability for directors of unincorporated associations (even if they acted honestly and were not involved in a contravention) will provide a disincentive for people to volunteer. AICD recommended a carve-out for volunteer directors of unincorporated associations.¹⁰⁵

2.75 The Executive Council of Jewry, the Jewish Communal Appeal and the Jewish National Fund, argued that a director of an incorporated charity who serves on a voluntary basis should only be liable for their personal criminal actions. The Council emphasised that the importance of this arrangement given that 'a high proportion of directors of charities serve on a voluntary basis' and should be supported in their efforts.¹⁰⁶

2.76 However, Philanthropy Australia told the committee that it was comfortable with the amendments to the director's liability provisions. Mr Ward commended the work of the House Committee and the government's response, adding:

...those volunteering their time to be on not-for-profit boards should not be subject to greater penalties than those on the boards of commercial organisations. I think that change has been greatly welcomed, and it takes away one of the significant concerns about the second draft of the legislation.

...I think the view of most of the people involved in the not-for-profit sector...is that doing the right thing is paramount. Having some degree of regulation in fact often assists directors because they know they are filing returns and that there is a check that they are doing the right thing as far as the regulatory format is concerned.¹⁰⁷

2.77 Mr Ward added that directors themselves would expect that it is only correct that where there are actions of recklessness or gross negligence, directors should be held accountable for those actions. He noted that whether the directorship is for

104 Australian Institute of Company Directors, *Submission 24*, p. 4.

105 Australian Institute of Company Directors, *Submission 24*, p. 4.

106 Executive Council of Jewry, *Submission 16*, p. 2; Jewish Communal Appeal, *Submission 18*, Jewish National Fund, *Submission 25*.

107 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 19.

payment or whether on a voluntary basis, there should be a requirement to accept responsibility to ensure that the entity complies with the regulatory framework.¹⁰⁸

2.78 The committee asked Treasury to comment on the proposition that being a director of a not-for-profit agency will now potentially be more onerous than being a director of a for-profit organisation. Mr Chris Leggett, Manager of Treasury's Philanthropy and Exemptions Unit, responded:

I would have to say that we disagree with that statement. The amendments that we have made to the Corporations Act to shift responsibility for the ongoing running of these entities from the corps act and from the tax office's oversight into the ACNC have significantly reduced the obligations on existing company directors. There are far more safeguards within the ACNC bill over when the commission can take action and what penalties et cetera directors are liable for. They are significantly reduced from their existing Corporations Act and tax law requirements.¹⁰⁹

Committee view

2.79 The committee believes that the amendments to director liability provisions are appropriate and does not believe there should be a lesser standard of responsibility or penalty for directors that serve on a voluntary basis. The committee also highlights Treasury's point that there are more safeguards within the ACNC bill relating to directors' penalties and liabilities than those within the Corporations Act.

The reporting thresholds

2.80 Another issue of stakeholder concern with the ACNC bill relates to the reporting thresholds for entities based on their annual turnover (see Figure 2.2). Some submitters to this inquiry viewed these monetary thresholds as being too low and therefore too burdensome for not-for-profit entities to comply.

2.81 Moore Stephens, for example, argued that the bill's requirement for all Registered Entities with revenue greater than \$250 000 in a financial year to prepare a general purpose financial report is 'far too onerous' and costly. It explained:

...we remain concerned as to the number of entities that would be included in the financial reporting requirements as a result of the size criteria of revenue set for determining small, medium and large Registered Entities. Our analysis indicates that this will see nearly 50% of Registered Entities being classified as being medium or large and therefore will be required to comply in full with the onerous obligations of the Bill. Accordingly, we continue to be of the view that the size criteria for determining medium and

108 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 19.

109 Mr Chris Leggett, Manager, Philanthropy and Exemptions Unit, Department of the Treasury *Proof Committee Hansard*, 3 September 2012, p. 47.

large entities could be doubled to \$500,000 and \$2,000,000 respectively without having any impacts on the core aims of the Bill.¹¹⁰

2.82 Moore Stephens proposed that the minimum requirements of the financial reporting framework should be more clearly defined in the bill itself, rather than left to the regulations.¹¹¹

2.83 The Independent Schools Council of Australia argued that from the perspective of the entities it represents, the thresholds for small, medium and large registered entities under the proposed legislation are too low. Specifically, it claimed that these thresholds are not reflective of the low risk profile of the independent school sector. The Council claimed that these thresholds may place not-for-profits that raise revenue through normal commercial transactions, and much less revenue from public sources, in the same category as entities that rely solely on grants and public donations. It estimated that in the independent schools sector, on average, schools receive around 40 per cent of their revenue from government grants and the remainder from other sources.¹¹²

2.84 The Chair of the Not-for-profit Sector reform Council acknowledged that the size of the thresholds would need to be a matter of review by the ACNC. Ms Lavarch told the committee:

Our continuing concern is over the level of the tiers for reporting. But we accept that the levels have been set in legislation and we ask that that be an ongoing review of whether those levels are being set—that the thresholds are at the right levels—and that will be something we have asked the ACNC to continue monitoring. We certainly welcome that there is a five-year review of the legislation and ask that that reports back against the reduction in red tape as well.¹¹³

2.85 The committee asked Philanthropy Australia if it could characterise the type of entity that would be over the \$1 million annual turnover threshold. Mr Ward responded:

For the members of Philanthropy Australia, which are foundations, to achieve a revenue of more than \$1 million means they probably have to have about \$20 million or so in funds. Therefore, having an audit and full reporting where someone is sitting on \$20 million is to our mind appropriate. In fact, we have had as one of our governance principles for a number of years that large foundations that are not required to report should in fact have audited financial statements when they reach a threshold level.

110 Moore Stephens, *Submission 30*, p. 7.

111 Moore Stephens, *Submission 30*, p. 7.

112 Independent Schools Council of Australia, *Submission 15*, p. 6.

113 Ms Linda Lavarch, Chair, Not-for-profit Sector Reform Council, *Proof Committee Hansard*, 3 September 2012, p. 15.

We have talked about between \$10 million and \$20 million in the past. From our sector's perspective, those thresholds are fine.¹¹⁴

...

The ones that will face increased burdens will be the larger foundations that now meet the thresholds for reporting requirements. As I said, charitable trusts with more than roughly \$20 million in their corpus will be required, and they are also the ones that are claiming the large amounts of franking credit refunds. They will be the ones which will now be required to file reports with the ACNC.¹¹⁵

Committee view

2.86 The committee believes that the proposed reporting requirement thresholds are appropriate. It emphasises the need for large entities—those with more than \$1 million in annual turnover and roughly \$20 million in funds—to have stricter reporting requirements than entities with less turnover and fewer funds. This is entirely logical and prudent. Accurate and detailed financial reporting requirements for entities managing considerable funds are a matter of good risk management. This noted, the committee does believe it is important that these thresholds are periodically reviewed.

Recommendation 2.2

2.87 The committee recommends that as part of the five year review of the operation of the ACNC, the annual reporting requirement thresholds are reviewed. This review should consider the evidence that existing thresholds have been fairly and appropriately set based on the need for transparency and risk-management on one hand with the compliance burden on the other.

2.88 The committee believes it is important to provide certainty to the schools sector regarding current requirements to lodge annual financial reports to Australian government agencies and how this relates to the financial reporting requirements of non-government schools in the Australian Charities and Not-for-profits Commission Bill 2012.

Recommendation 2.3

2.89 The committee acknowledges that schools are required to provide annual financial reports to the Australian Curriculum, Assessment and Reporting Authority as part of the My School website. This data is extensive and thus the Australian Charities and Not-for-profits Commission should accept that data as

114 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 20.

115 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 21.

suitable to meet the annual financial reporting requirements in the ACNC Bill. The committee recommends that the Bill be amended to this effect.

The operational independence of the ACNC

2.90 Clearly, the not-for-profit sector endorses the creation of an independent regulator. Submissions to the House Committee's inquiry indicate that there are concerns within the sector with the suitability of the ATO retaining regulatory responsibilities.¹¹⁶ The Smith Family's submission to this inquiry also raised this issue:

[S]ome of the current arrangements of the sector are far from ideal. In particular, the ATO's dual role as determinator of charitable status and collector of government revenue is problematic.¹¹⁷

2.91 Chartered Secretaries Australia argued in its submission:

The sector itself supports a national regulator and has been clear in each inquiry that it does not support retaining the regulatory function within the Australian Taxation Office (ATO) because of a perceived conflict of interest in that the ATO would be acting as both a revenue raiser and regulator. The sector has clearly expressed its desire for a new, dedicated regulator in each inquiry.¹¹⁸

2.92 The extent to which the ACNC will operate independent from other Commonwealth regulators has been questioned. The Australian Council for International Development recommended that Chapter 5 of the ACNC Bill be amended to expressly articulate the independence expected of the ACNC Commissioner and ACNC staff.¹¹⁹

2.93 Treasury advised that the ACNC Bill as currently drafted supports the creation of an independent regulator:

The ACNC will be established as an independent statutory office structurally separate from the ATO. The bill ensures the independence of ACNC, for example, by requiring the ACNC to report directly to Parliament. The ACNC Bill also expressly provides that ACNC officers act independently of the ATO, such as when carrying out their duties under the ACNC legislation.

The structural separation will help to address any perceived conflicts of interest that currently exist with ATO's revenue collection role and its current role as the default NFP regulator. This, in turn, will ensure that the

116 House of Representatives Standing Committee on Economics, *Report on the exposure draft of the Australian Charities and Not-for-profits Commission Bills 2012*, August 2012, p. 6.

117 The Smith Family, *Submission 1*, p. 2.

118 Chartered Secretaries Australia, *Submission 3*, p. 3.

119 Australian Council of International Development, *Submission 41*, p. 7.

public have confidence in the ACNC Commissioner's decision making processes.¹²⁰

2.94 While acknowledging that the ACNC will receive back-office and administrative support from the ATO, Ms Pascoe advised that the Commission will exercise its regulatory responsibilities independent of the ATO. The committee was further informed that administrative and staffing support from the ATO have been provided under a Memorandum of Understanding under which the Commissioner of Taxation has transferred authority over nominally ATO staff to the ACNC Commissioner.¹²¹

Committee view

2.95 The committee acknowledges stakeholder concerns regarding the independence of the ACNC. However, on the basis of evidence provided to this inquiry, it is not apparent that the administrative arrangements to support the operation of the ACNC will compromise the Commission's independence. The committee concurs with the view of the House Committee that 'the Bills will establish an independent, national regulator for the sector'.¹²²

Recommendation 2.4

2.96 The committee recommends that the Australian Charities and Not-for-profits Commission Bill 2012 be passed.

120 Treasury, *Submission 31*, p. 6.

121 Ms Susan Pascoe, Interim Commissioner, ACNC Interim Taskforce, *Proof Committee Hansard*, 3 September 2012, p. 6.

122 House of Representatives Standing Committee on Economics, *Report on the exposure draft of the Australian Charities and Not-for-profits Commission Bills 2012*, August 2012, p. 75.

Chapter 3

Consequential and transitional provisions and the governance and reporting framework

3.1 This chapter outlines the transitional and consequential provisions necessary to establish the Australian Charities and Not for Profits Commission (ACNC). These provisions are set out in the Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Bill 2012 (the bill). In terms of the transitional amendments, the bill clarifies the initial registration process and ensures that the Commissioner has the discretion to reduce not for profit entities' reporting requirements. In terms of consequential amendments, the ACNC legislation will necessitate various changes to Commonwealth statutes. The bill ensures that agencies' responsibilities are not duplicated and that the ACNC assumes its role.

3.2 The latter part of this chapter considers the vexed issue of the form and the commencement date of the governance standards and reporting requirements for not-for-profit entities. These have been left to the regulations accompanying the bill. The government's position—which the committee shares—is to set the ACNC framework in place on 1 October 2012, consult properly on the form the regulations will take, and commence the governance and reporting obligations as scheduled on 1 July 2013.

3.3 However, several submitters and witnesses to this inquiry have expressed concern with this approach. Some argued that the ACNC bill itself should be deferred until the regulations are prepared. Others prefer passing the ACNC bill as planned but delaying by six months the start of the regulations.

Provisions of the Australian Charities and Not-for-profits (Consequential and transitional Amendments) Bill 2012

Transitional amendments

3.4 The intent of the bill is to provide a smooth transition to the new regulatory framework:

- Clause 5 of the bill provides for automatic registration of charities that are endorsed by the ATO unless the entity opts out within 6 months¹;
- Clause 8 of the bill relates to the provision of annual reports to the ACNC and allows grandfathering of existing substituted accounting periods applying to entities in certain cases

1 Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, section 5.

3.5 Part 4 of the bill deals with the issue of reporting. Subclause 10(1) of the bill states that the ACNC Commissioner *may* treat a statement, report or other document given under an Australian law to an Australian government agency (other than the Commissioner) by a registered entity as being an information statement or a financial report for a financial year given to the Commissioner under the ACNC bill.² Treasury noted in its submission that this provision enables the ACNC Commissioner to address potential reporting duplication during the process of establishing the regulator.³

3.6 This provision was made following the recommendation of the House of Representatives Economics Committee's recommendation in August 2012:

That the Commissioner have discretion to accept reports or material prepared for other agencies and levels of government as reports for the purpose of the reporting framework under the Bills. This arrangement should be time limited and be reviewed as the lodge-once use-often process is developed.⁴

3.7 Part 9, clause 16 of the bill states that the Minister must cause a review to be undertaken of the first five years of the operation of the ACNC Act and the ACNC Consequential and Transitional Act.

Consequential amendments

3.8 The bill's consequential amendments enable the ACNC to determine the charitable status of entities on behalf of all Commonwealth agencies. Treasury noted that consequential amendments to various Commonwealth Acts are needed to ensure the ACNC's registration applies across all Commonwealth agencies.⁵ The bill amends various Commonwealth Acts to ensure that charities are registered by the ACNC under their charitable status and that they may therefore access concessions, exemptions and benefits. The following Acts are among those that the bill amends:

- Divisions 30 and 50 of the *Income Tax Assessment Act 1997*;
- the *Competition and Consumer Act*;
- the *Do Not Call Register*;
- the *Fringe Benefits Tax Assessment Act 1986*; and
- *A New Tax System (Goods and Services Tax) Act 1999*.

2 Treasury, *Submission 31*, p. 13. Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, section 10.

3 Treasury, *Submission 31*, p. 13.

4 House of Representatives Standing Committee on Economics, *Report on the Exposure Draft of the Australian Charities and Not-for-profits Commission Bills 2012*, August 2012, p. xiii.

5 Treasury, *Submission 31*, p. 13.

The need for coordination between the ACNC and ASIC

3.9 The bill also amends Commonwealth legislation to establish the ACNC. The bill clarifies the responsibilities of the Australian Securities and Investments Commission (ASIC) given that parts of ASIC's current role as the regulator of not-for-profit entities will be transferred to the ACNC. Specifically, while ASIC will continue to register companies including companies limited by guarantee, it will have limited oversight of the financial reporting and governance arrangements of those companies that choose to register with the ACNC.⁶ From 1 July 2013, the ACNC will conduct the financial reporting surveillance of companies registered with the ACNC. However, ASIC will retain the power to obtain information in respect of ACNC audits.

3.10 The bill also removes duplication in the ASIC Act with regard to:

- the requirement for entities to notify ASIC of changes to its details, given that this will now be provided to the ACNC;
- certain director's duties for entities registered with the ACNC, given that responsible entities will be subject to equivalent governance standards specifically for the not for profit sector;
- the financial reporting requirements in the Corporations Act, given that new reporting requirements are contained in the ACNC Bill; and
- procedural requirements of Annual General Meetings, given that these will be simplified and tailored for not for profit entities in the ACNC regulations.⁷

3.11 Importantly, particularly given this committee's purview, the bill contains a regulation making power which enables certain provisions of the Corporations Act relating to registered entities to be 'turned off' where there is overlap with ACNC reporting and governance standards. These standards will commence on 1 July 2013.

3.12 The committee is keen to monitor the interaction between ASIC and the ACNC as part of the committee's ongoing ASIC oversight role. Clearly, there will need to be ongoing dialogue and coordination between the two Commissions to ensure that:

- in the first instance, the governance standards, financial reporting obligations and procedural requirements that are currently overseen by ASIC are transferred to the ACNC;
- thereafter, both Commissions are aware of any changes in these governance, reporting and procedural requirements;
- ASIC has a clear understanding of the mechanism through which not-for-profits register (and deregister) with the ACNC; and

6 Treasury, *Submission 31*, p. 15.

7 Treasury, *Submission 31*, p. 16.

- arrangements are in place to allow ASIC access to the ACNC's audits.

Submitters' views on these provisions

3.13 Most submitters to this inquiry focused their comments on the provisions of the main ACNC bill (chapter 2) and the 'In Australia' bill (chapter 4). However, several submitters did comment on clause 10 of the consequential and transitional arrangements bill. Chartered Secretaries Australia, UnitingCare and the Independent Schools Council of Australia all welcomed the insertion of this provision.

3.14 Still, some submitters wanted greater assurance that there would be no duplication in reporting responsibilities between those of the ACNC and other government agencies. The Australian Catholic Bishops Conference proposed requiring the ACNC to use existing reports provided to other federal government agencies for the first three years of its operation.⁸ It put the following argument:

We could, I think, go a long way towards solving this red tape reduction by the change of one word in the transitional bill—the word 'may' to 'must' in section 10, relating to the discretion of the commissioner to accept the reports of other departments. Just by way of illustration, our schools sector was highly compliant and extremely seriously regulated in great detail. I gave evidence to the House committee and I had with me the 51-page explanatory memorandum that tells them how to put in the 26-page financial questionnaire for DEEWR. There are enormously detailed regulatory requirements on schools. Their concern is: will the ACNC replace any of that or simply be another point of accountability?⁹

3.15 World Vision Australia made a similar proposal, suggesting that clause 10 be amended to permit the Commissioner to treat any annual report—even those not required by law—as an information statement or report under the ACNC Bill.¹⁰

3.16 The Independent Schools Council of Australia argued that non-government schools should either be an exempt entity, or the Commissioner should have the power to exempt the schools from the duplicative reporting requirements for a five year period (coinciding with the review period).¹¹

3.17 The accounting firm Moore Stephens recommended that the proposed discretion to the Commissioner be replaced by 'a voluntary reporting regime during at

8 Australian Catholic Bishops Conference, *Submission 17*, p. 10.

9 Father Brian Lucas, General Secretary, Australian Catholic Bishops Conference, *Proof Committee Hansard*, 3 September 2012, p. 23.

10 World Vision Australia, *Submission 29*, p. 4.

11 Independent Schools Council of Australia, *Submission 15*, p. 6.

least the first three years of the Commission'. It argued that this will enable the ACNC to focus on the transition to an effective 'report-once, use-often' framework.¹²

3.18 The Bishops Conference also proposed to amend the provision of the transitional bill relating to the substituted accounting period. Father Lucas told the committee:

We believe that the current substituted accounting periods which charities already operate under should be grandfathered across the board. In the church context, where you have a multiplicity of accounts and different requirements, it is a simple practical matter for your auditors that you try and spread the audit over a June year-end and a December year-end. So most church, parish and diocesan accounts will have their DGR entities reporting on a June year-end and their other accounts on a calendar year. It spreads the workload, it spreads the audit requirements and I believe that there is no policy reason for not having a great deal of flexibility for substituting accounting periods.¹³

Committee view

3.19 The committee strongly supports Part 4, clause 10 of the bill, which allows the Commissioner to consider the existing reporting arrangements of entities such as the non-government schools sector and charitable indigenous corporations. In exercising this discretion, the bill rightly directs the Commissioner's attention to factors including the access that the Commissioner has to other reporting documents, whether a document contains the information required under the ACNC Act, and the processes that have been undertaken to verify the information contained in the statement. The committee believes that these provisions are well drafted and far more prudent than an outright requirement that the Commissioner must accept any reporting statement prepared for other government agencies.

Governance standards and reporting arrangements

3.20 Several witnesses to this inquiry expressed concern that the regulations relating to governance standards and reporting arrangements would not accompany the passage of the bill. They argued that the bill and the regulations should be considered as a package. Mr Paul Ronalds of the Department of Prime Minister and Cabinet identified two areas of disagreement among stakeholders in terms of the process for establishing the reporting and governance standards:

There was a significant push from the sector itself to establish the ACNC in the first instance and to then have a much longer period for consultation around those governance and reporting standards; however, that is not uniform. There are some within the sector who say: 'No. We essentially

12 Moore Stephens, *Submission 30*, p. 3.

13 Father Brian Lucas, General Secretary, Australian Catholic Bishops Conference, *Proof Committee Hansard*, 3 September 2012, p. 23.

want it all perfectly built before we get started. Until we have seen the whole edifice, we don't want to support any of it.' I am caricaturing, but that would be a very broad part.

The second broad range of disagreements is in relation to the participation of the states and territories. Again, from the perspective of Prime Minister and Cabinet and the Office of the Not-for-profit Sector, we received significant input from the sector saying, 'No; we want the Commonwealth government to get its own house in order, to get started establishing the ACNC, to fix up the regulatory duplication at the Commonwealth level and to then work with states and territories over time to also minimise the regulatory duplication at that level.' Again, that view is not uniform in the sector. There are some who are saying: 'No. Until you have broad based agreement with the states and territories on comprehensive regulatory reform across all levels of government, you shouldn't be introducing the ACNC.'¹⁴

3.21 A sense of these disagreements was captured in the committee's evidence. The Institute of Chartered Accountants Australia (ICAA), for example, told the committee that governance standards and reporting requirements need to be available before the parliament passes the ACNC legislation:

We suggest incorporating transitional provisions within the current legislation to allow an extra six to 12 months for people to become aware of the requirements and to prepare to adopt those new governance and reporting requirements.¹⁵

3.22 The ICAA noted that the reporting requirements will apply to unincorporated bodies, including those that currently have no state requirements for reporting. The ICAA contended that given this inexperience, and the fact that the regulations have not yet been drafted:

[T]here should be a minimum 12-month period from the date that such regulations are issued until the date for implementation by entities. So incorporating a transitional provision which is based on governance requirements, say, to be applied 12 months from the date of the regulations, and the reporting requirements, again commencing 12 months from the date of regulations, I would have thought, would be quite feasible.¹⁶

3.23 The accounting firm, Moore Stephens, was also concerned that the ACNC bill contains no detail about governance and reporting standards. Mr Joe Shannon told the committee that:

14 Mr Paul Ronalds, First Assistant Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 3 September 2012, p. 4.

15 Ms Kerry Hicks, Head of Reporting, Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 3 September 2012, p. 31.

16 Ms Kerry Hicks, Head of Reporting, Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 3 September 2012, p. 35.

...as an example, there is nothing currently in the bill on how the ACNC would link into the Australian Accounting Standards Board. We think that link is absolutely vital to make it work effectively in terms of the reporting regime. Currently there is no reference to that in the bill whatsoever, which we think is something very much lacking. Similarly to some comments that I heard earlier, we are concerned about the annual information statement. We do not know the detail around that and are concerned that it might indirectly include some financial information, so we would like to see the detail around that before we could really have clear comments.¹⁷

3.24 Father Brian Lucas, General Secretary of the Australian Catholic Bishops Conference, told the committee that the governance arrangements 'could perhaps be improved by mandating in the legislation high-level governance requirements'. He noted that in leaving these arrangements to regulation, there is uncertainty and 'the real risk that governance requirements will become very restrictive and prescriptive'.¹⁸

3.25 Other witnesses had a markedly different view. Mr David Crosbie of the Community Council for Australia had a pragmatic approach:

The issue here is how many ducks do we need lined up on the wall before we say that we have decorated. We are not going to get the ACNC up and operational—cutting red tape and having all the states and territories referring their powers, all the governance and finance reporting and everything else in place—in year one. Those people who expected to do those and any number of other tasks, which sound to me quite fanciful, have obviously never been involved in a regulatory environment or in simply maintaining an up-to-date, relevant and accurate database of over 50,000 organisations. Frankly, if in one year's time or even two years time we can have a single source of accurate, relevant and timely information about not-for-profit organisations in this country—information validated to a level that states and territories and other Commonwealth agencies will draw upon—up and operational and searchable as a one-stop shop for that information, we will have done remarkable work.¹⁹

3.26 Mr Crosbie proposed that initially, the governance and finance reporting should be kept to a minimum until adequate work is done with the range of diverse not-for-profit entities in the sector. He argued that building a scalable and proportional reporting system that caters to this diversity will take some time. Mr Crosbie

17 Mr Joe Shannon, Chairman, Not for Profit Group, Moore and Stephens, *Proof Committee Hansard*, 3 September 2012, p. 31.

18 Father Brian Lucas, General Secretary, Australian Catholic Bishops Conference, *Proof Committee Hansard*, 3 September 2012, p. 24.

19 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Proof Committee Hansard*, 3 September 2012, p. 42.

welcomed the fact that the ACNC would be given some time to achieve this task and added: 'I would much rather the ACNC was doing that than the Treasury'.²⁰

The government's position

3.27 Officials from Treasury and the Department of Prime Minister and Cabinet explained the government's decision to stagger the introduction of the legislation and the regulations. Mr Martin Jacobs from Treasury told the committee:

...there was certainly a clear message that the sector wanted additional time to be involved in consultation on the development of the financial reporting and governance regulations. So the government has announced a staged implementation of the ACNC, including that those reporting and governance arrangements would not commence until 1 July 2013 and that they would be subject to a detailed consultation process.²¹

...there is clear support from the sector for the establishment of the ACNC from 1 October this year and then to allow further time to develop those governance and reporting regulations.²²

3.28 Mr Ronalds drew the committee's attention to the often protracted negotiations between the Commonwealth and state and territory governments through the Council of Australian Government (COAG) process. He told the committee:

Our perspective is that it was much better to begin the regulatory reform process, to make the improvements at the Commonwealth level and to then work very constructively with the states and territories, and that is in fact what is going on. There has been significant work with the states and territories already about what could be done and it is certainly my firm view that, if the regulator is established on 1 October, the momentum will only build both from the sector and from our work directly with states and territories.²³

3.29 However, Mr Ronalds noted that while there are differences of view as to the specific reporting and governance standards, this should not be interpreted as a sign that the not for profit reform agenda has lost support. As he told the committee:

What I would say is that I do not think that there are any states that are not on board. All of the states and territories that I have been negotiating with have made that very clear, and in fact this is reflected in the COAG communiques for at least the last two COAG meetings. All states and

20 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Proof Committee Hansard*, 3 September 2012, p. 42.

21 Mr Martin Jacobs, Acting Principal Adviser, Treasury, *Proof Committee Hansard*, 3 September 2012, p. 4.

22 Mr Jacobs, Treasury, *Proof Committee Hansard*, 3 September 2012, p. 4.

23 Mr Paul Ronalds, First Assistant Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 3 September 2012, p. 4.

territories are committed to red tape reduction and the significant benefits that can flow from a one-stop shop national regulator.²⁴

...

I think they are waiting for the bill to be passed before they put anything formally on the table. Obviously we have an extensive process around the governance and reporting standards that they are most interested in, but they have all formally signed on to participating in the process. Their willingness to participate in the process is very clear from the COAG communiques of the last two meetings. Once the bill is passed, assuming it is, I think you will see even more significant momentum from individual states and territories, and over time from all of them, to reform their own regulatory arrangements to make sure that they minimise any regulatory duplication.²⁵

Committee view

3.30 The committee strongly supports the timetable for the commencement of both the ACNC and the governance standards and reporting requirements. It is important that the ACNC commence as scheduled on 1 October 2012 and that it has as one of its first key tasks the negotiation of clear and effective governance and reporting requirements for the diverse not-for-profit sector. The accomplishment of this task will give the many stakeholders in the sector great confidence in the role and the expectations of the ACNC Commissioner.

Recommendation 3.1

3.31 The committee recommends that upon the establishment of the Australian Charities and Not-for-profits commission on 1 October 2012, the Commissioner promptly engages stakeholders to devise a set of governance standards and reporting requirements for the sector. These requirements must balance the need for probity and transparency with an acknowledgement of the time and cost that these arrangements may pose, particularly for smaller entities.

Recommendation 3.2

3.32 The committee recommends that the Australian Charities and Not-for-profits (Consequential and Transitional) Bill 2012 be passed.

24 Mr Paul Ronalds, First Assistant Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 3 September 2012, p. 7.

25 Mr Paul Ronalds, First Assistant Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 3 September 2012, p. 8.

Chapter 4

Tax Laws Amendment (Special Conditions for Not-For-Profit Concessions) Bill 2012

4.1 This chapter analyses the provisions of the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (the TLAB). As chapter 1 noted, the TLAB has also been called the 'In Australia' bill. It restates the 'in Australia' special conditions for income tax exempt entities and for deductible gift recipients (DGRs).¹

4.2 The TLAB contains proposed amendments to 12 Commonwealth Acts to standardise 'in Australia' special conditions for income tax exempt entities and DGRs. The bill would also introduce a consistent definition of not-for-profit entities throughout the tax laws. The following Acts would be amended: the *Income Tax Assessment Act 1997* (ITAA); the *Income Tax (Transitional Provisions) Act 1997*; the *Tax Laws Amendment (2011 Measures No. 2) Act 2011*; the *Income Tax Assessment Act 1936*; the *Taxation Administration Act 1953*; the *A New Tax System (Australian Business Number) Act 1999*; the *A New Tax System (Goods and Services Tax) Act 1999*; the *Extension of Charitable Purpose Act 2004*; the *Fuel Tax Act 2006*; the *Income Tax Act 1986*; the *Income Tax Rates Act 1986*; and the *Fringe Benefits Tax Assessment Act 1986*.

Provisions of the bill

'In Australia' special conditions for deductible gift recipients

4.3 Schedule 1 would commence on the day after Royal Assent, and would:

- reverse the effect of the High Court of Australia's decision in the *Federal Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204 (*Word Investments*);
- apply a standard set of preconditions for all categories of income tax exempt entities;
- harmonise relevant Commonwealth legislation through introducing a standard definition of, and terminology to, refer to not-for-profit entities; and

1 Deductible gift recipient (DGR) status is granted by the government to eligible not-for-profit entities to promote philanthropic giving from individuals and businesses to these organisations. Organisations must be endorsed by the ATO or listed by name in the tax law. Donations made to an organisation with DGR status are tax-deductible.

- codify the 'in Australia' special conditions for DGRs.²

4.4 Schedule 1, Part 1, Items 1 and 2 would amend the ITAA to codify the 'in Australia' special conditions for DGRs with the effect that the core principles for income tax identities would apply similarly to deductible gift recipients but with existing higher thresholds.³ A DGR would satisfy the 'in Australia' conditions if located in Australia, operating solely in Australia and pursuing its purposes solely in Australia.⁴ Activities outside Australia will not preclude an entity from meeting the 'in Australia' requirements provided the activities are incidental or are minor when compared with the entity's Australia-based operations.⁵ The Explanatory Memorandum (EM) to the bill notes that the following scenario would not satisfy the bill's proposed 'in Australia' requirements:

A public museum is incorporated in New Zealand and has a branch in Australia.

It is not 'in Australia'. It cannot be endorsed as a deductible gift recipient.⁶

4.5 In contrast, the EM provides the following example of minor and incidental activities that would be considered to fall within the bill's proposed 'in Australia' requirements:

A public benevolent institution provides medical assistance to children in Australia with a particular disability but, to a minor extent, it also brings children from other countries to receive treatment in Australia.

The institution would still meet the 'in Australia' special conditions.⁷

4.6 Part 1, Schedule 1 would also establish exceptions to the 'in Australia' conditions that would apply to DGRs. Despite undertaking overseas activities, DGRs under the 'international affairs' category, such as overseas aid funds, or listed on the Register of Environmental Organisations would be exempt from the 'in Australia' special conditions. An entity may appeal to the Administrative Appeals Tribunal decisions of the Secretary of the Environment Department regarding the Register of

2 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraph 1.52.

3 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraphs 1.123-1.128.

4 Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, Schedule 1, Part 1, Item 2, section 30-18.

5 Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, Schedule 1, Part 1, Item 2, subsection 30-18(2).

6 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, Example 1.13: Pursuit of purposes, paragraph 1.129.

7 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, Example 1.17: The institution would still meet the 'in Australia' special conditions: Minor and incidental activities, paragraph 1.130.

Environmental Organisations.⁸ However, such entities would still be required to satisfy the 'in Australia' test for any activities not related to the 'international affairs' or the Register of Environmental Organisations exemptions.⁹

4.7 Schedule 1, Part 1, Item 13, subsection 30–80(2) would streamline existing provisions in the ITAA by ensuring that all entities currently approved to operate overseas are listed in the 'international affairs' category in Division 30 of the Act. Schedule 3, Items 1 to 3, subsection 30–8(2) and section 30–315 would amend the 'international affairs' category to include the Australian Chamber Orchestra Pty Ltd and the Sydney Dance Company. The EM notes that to remain on the 'international affairs' list each entity would be required to ensure that the international activities remain under 25 per cent of the entity's overall activities. The inclusion of both entities on the international affairs list would be reviewed in three years' time.¹⁰

4.8 Schedule 1, Part 1, Item 23 would amend the Income Tax (Transitional Provisions) Act to allow certain medical research institutions to be prescribed in regulations as satisfying the 'in Australia' special conditions.¹¹ The government has announced its intention to examine options to establish a permanent DGR category for medical research institutions for which a significant proportion of their activities are conducted overseas.¹²

Income tax exempt entities

4.9 Schedule 1, Part 2, Item 38, section 50–50 would amend the ITAA to reverse the High Court of Australia's decision in *Word Investments*. The EM argues that the proposed legislative amendments restate the policy operative prior to the High Court's judgement.¹³ To qualify as tax-exempt, an entity would be required to:

- operate principally in Australia;
- pursue its purposes principally in Australia;
- comply with all substantive requirements in its governing rules;

8 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraphs 1.131-1.151.

9 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraphs 1. 143-1.144.

10 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraph 1. 151.

11 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraph 1.149.

12 The Hon. David Bradbury, Second Reading Speech, Assistant Treasurer, *House of Representatives Hansard*, 23 August 2012, pp5-7.

13 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraph 1.55.

- apply income and assets solely to pursue the purposes for which it was established; and
- be a not-for-profit entity.¹⁴

4.10 'Principally' is not defined in the bill. However, the EM notes that principally 'means mainly or chiefly. Less than 50 per cent is not considered principally'.¹⁵

4.11 The EM notes that the proposed provisions are a departure from the law as it existed prior to *Word Investments*. Currently, there is an expenditure test which considers where the entity incurs its expenditure. The EM states that the existing expenditure-based test would be substituted with an 'operates' and 'pursues its purposes' based test. The EM outlines that the amendments would allow a broader range of circumstances to be taken into account, enhance the integrity of the rules, give greater effect to the policy intent and better align the income tax exempt entities test with the proposed DGR 'in Australia' special conditions test.¹⁶ According to the EM, the following scenario would satisfy the 'operates in Australia' test:

An organisation is established as a Bible college in Australia, and runs weekly lessons for children in Australia.

The organisation fundraises in Australia, but purchases much of the supplies and equipment (such as religious books) from overseas.

Whilst this organisation may not have met the expenditure test in the previous law, depending on the other facts and circumstances of the organisation (such as possible assets and employees in Australia, and management control in Australia), the entity may now meet the 'in Australia' special conditions.¹⁷

4.12 However, the following scenario would not satisfy the 'in Australia' requirements for income tax exemption:

In *Word Investments*, the entity distributed its money to Wycliffe Bible Translators, which then expended the money offshore. If an entity such as *Word Investments* now provides money to another entity, it must consider the location of the final spending of this money when determining whether it is operating and pursuing its purposes solely in Australia. The money *Word Investments* provided to Wycliffe was sent overseas, so *Word Investments* would need to consider the amounts of money provided to

14 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraph 1.53.

15 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraph 1.58.

16 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraphs 1.59–1.60.

17 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraph 1.60.

entities such as Wycliffe (which are ultimately spent offshore) when considering whether it is operating and pursuing its purposes principally in Australia.

1.81 If Word Investments provides all its funds to Wycliffe, who continues to pass these funds overseas, Word Investments will no longer be considered to be operating and pursuing their purposes solely in Australia, and will not be income tax exempt.

In addition, if Wycliffe Bible Translators do not operate principally in Australia (because they pass all fund offshore), they will no longer be entitled to be income tax exempt.¹⁸

4.13 This is in contrast to the High Court's ruling in *Word Investments*.

Definition of not-for-profit

4.14 Part 1 of Schedule 1 of the Tax Laws Bill would also amend the ITAA to standardise terminology relating to not-for-profit entities. References to 'non-profit company' would be substituted with 'company that is a not-for-profit entity'.¹⁹ Part 4, Schedule 1 contains consequential amendments to Commonwealth legislation to ensure that the terminology 'not-for-profit entity' is used throughout.²⁰

4.15 Part 3 of Schedule 1 would introduce a uniform definition of a not-for-profit entity for the purposes of Commonwealth taxation laws. 'Not-for-profit entity' would be defined as an entity that:

- is not carried on for the profit or gain of its owners or members; and
- is prohibited under Australian law, a foreign law, or the entity's governing rules from distributing, and does not distribute, its profits and assets to owners or members.²¹

Regulation making power

4.16 Schedule 1, Part 2, Item 38, paragraph 50-51(2)(c)-(d) would introduce regulation making power that would allow certain overseas entities, and entities that while located in Australia principally conduct activities overseas, to be prescribed in

18 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraphs 1.80-1.82.

19 Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, Schedule 1, Part 1, Items 11-12.

20 Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, Schedule 1, Items 3,4,6, 11, 12, 35, 46 to 107, 111, 118 to 121, and 126 to 165; Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraph 1.116.

21 Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, Schedule 1, Part 3, Item 44, subsection 995-1(1).

regulations as income tax exempt entities. The EM notes that regulation making power is intended to be used 'only in exceptional circumstances, at the discretion of the Governor-General in Council'. The EM further notes that it is expected the Governor-General would 'consider matters such as whether the entity will be providing a broad benefit to the Australian community, national interest, tax system integrity, the risk of the entity being utilised for money-laundering or terrorist financing'.²²

Context of the bill

4.17 Established in 1989 by the G-7, the Financial Action Task Force on Money Laundering (FATF) determines international standards for legal, regulatory and operational measures to deter money laundering, terrorist financing and other activities that may threaten global financial integrity. The task force's 49 recommendations are recognised as the international standard for national regulation and deterrence measures.

4.18 Recommendation 8 has implications for Australia's regulation of not-for-profit entities. Under a broad directive to 'review the adequacy of laws and regulations that can be abused for the financing of terrorism', countries are directed to focus on the 'particular vulnerability' of not-for-profit entities. FATF considers that the not-for-profit sector is vulnerable to exploitation by terrorist organisations due to public confidence in the entities within the sector, the sector's access to finance and its international reach, and the reduced regulation and formal government scrutiny under which not-for-profit entities can operate. Accordingly, as detailed in the recommendation's accompanying explanatory material, Recommendation 8 urges countries to promote transparency within the sector and 'prevent and prosecute as appropriate terrorist financing and other forms of terrorist support':

Recommendation 8: 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.

4.19 A founding member of the FATF, Australia has agreed to periodic reviews of its compliance with FATF standards. The results of the most recent review were

22 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraph 1.120.

published in 2005. While noting that, as at the date of the report, there were no demonstrated links between terrorist groups and Australia's not-for-profit sector, FATF concluded that Australia's compliance with Recommendation 8 could be strengthened.

4.20 In 2008, the High Court of Australia changed the taxation framework applying to not-for-profit organisations registered as charities with the Australian Taxation Office (ATO). Effective from 1 July 1997, registered charities operating 'in Australia' may be classified under Division 50 of the ITAA as 'income tax exempt entities'. To qualify, not-for-profit organisations were to be physically located in Australia and pursue their activities principally in Australia. The geographical nexus to Australia was intended to minimise the risk of income tax exempt entities operating as vehicles to finance terrorist activities.²³ The High Court of Australia's ruling in *Federal Commissioner of Taxation of Commonwealth of Australia v Word Investments Ltd* effectively broadened the 'in Australia' test. A four to one majority held that test is satisfied where an entity distributes funds to a second charitable entity that, while located in Australia, conducts its activities overseas.²⁴

4.21 The Second Reading Speech to the TLAB stated the Australian Government's concern that the Word Investments ruling will undermine Australia's capacity to protect the not-for-profit sector from abuse by terrorist organisations. Accordingly, the government announced its intention to 'amend the "in Australia" requirements in Division 50 of the ITAA to ensure that Parliament retains the ability to fully scrutinise those organisations seeking to pass money to overseas charities and other entities'.²⁵

4.22 Concurrent to these developments, successive reviews of the not-for-profit sector argued for the need for consistent definitions and terminology to apply across the not-for-profit sector.²⁶ In 2001, the Committee for the Inquiry into the Definition of Charities and Related Organisations recommended '[t]hat the term "not-for-profit"

23 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, paragraphs 1.7 – 1.11.

24 *Federal Commissioner of Taxation of Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204 Gummow, Hayne, Heydon and Crennan JJ, at 70.

25 The Hon. David Bradbury, Second Reading Speech, House of Representative Committee Hansard, 2012, pp 5-7.

26 See, for example, Productivity and Commission, *Contribution of the not-for-profit sector*, January 2010, Recommendations 5.1 and 5.2, which recommended the Australian Bureau of Statistics oversee implementation of an Information Development Plan for the not-for-profit sector and that Australian government should adopt a common framework for measuring the contribution of the not-for-profit sector; Senate Economics References Committee, *Investing for good: the development of capital market in the not-for-profit sector in Australia*, November 2011, Recommendations 7.1 and 7.2, which recommended the introduction of a uniform measurement framework to analyse the sector's performance.

be adopted in place of the term 'non-profit' for the purposes of defining a charity.'²⁷ In 2011, the government undertook consultations on options to implement this recommendation.²⁸

4.23 In May 2011, the government released the consultation paper *Better targeting of not-for-profit tax concessions* for public comment.²⁹ This six-week consultation period was followed by the release of two public exposure drafts of the measures contained in the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012.³⁰

Views on the purpose of the bill

4.24 World Vision has argued that the policy objectives of counter-terrorism and fighting money laundering should not be dealt with through the proposed TLAB. As Mrs Tanya Fletcher of World Vision told the committee:

We have argued consistently that we do not actually believe that this bill is the appropriate place to address external conduct standards because counterterrorism and anti-money-laundering measures are dealt with by the Attorney-General under different legislation. We are very much in favour of those areas being regulated; we just do not see that they need to be re-regulated within this bill, but could be left up to the Attorney-General to deal with.³¹

4.25 World Vision was asked what it viewed as the purpose of the TLAB. Ms Seak-King Huang responded:

We do not know, other than the view that seems to have emerged that regulations around anti-terrorism and anti-money-laundering are weaker with the not-for-profit sector. Yet we do not see any evidence of that. World Vision Australia, for example, is accredited with AusAID, and AusAID has fairly tough guidelines around these areas. We are also a signatory to the ASIC code of conduct, which has similar requirements.

27 Committee of Inquiry, *Report into the inquiry into the definition of charities and related organisations*, June 2001, Recommendation 1.

28 Treasury, *Submission 32*, p. 31, submission to House of Representatives of Standing Committee on Economics' enquiry into the Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012.

29 The Hon Bill Shorten MP, Minister for Financial Services and Superannuation, 'Next stage for not-for-profit reforms announced', Media release 083, 27 May 2011.

30 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraph 1.35.

31 Mrs Tanya Fletcher, Legal Counsel, World Vision Australia, *Proof Committee Hansard*, 3 September 2012, p. 40.

Both of them are in line with the Charter of the United Nations Act as well as the other pieces of legislation around this area.³²

Committee view

4.26 To the committee, this criticism seems misplaced. It is perfectly normal for governments to seek to achieve policy objectives through a number of legislative (and other) means. The objective of counterterrorism is an obvious priority for the government and, particularly in light of the concerns raised in the 2005 FATFA report, Australia should be doing more to prevent terrorist organisations from using not-for-profit entities as a front for their activities. The committee thereby contests World Vision's argument that the TLAB unnecessarily duplicates Australia's existing counter-terrorisms regulations.

The tracing provisions

4.27 Schedule 1, item 38 (proposed section 50-50(4)) of the TLAB relates to the conditions that a donating charity must meet to satisfy the 'in Australia' test and income tax exempt status. The threshold for this status is that the recipient must spend the funds 'principally' in Australia. The provision states:

Subject to subsection (5), if an entity provides money, property or benefits to another entity that is not an exempt entity, the use of the money, property or benefits by the recipient (or any other entity) must be taken into account when determining whether the first mentioned entity satisfies the requirements in paragraphs (2)(a) and (b).³³

4.28 Proposed subsection 30-18(3) relates to the conditions that a donating charity must meet to satisfy the 'in Australia' test and meet DGR status. The threshold for DGR status is far higher in that the recipient must spend the funds solely in Australia. The provision states:

If a fund, authority or institution provides money, property or benefits to another entity that is not a *deductible gift recipient, take into account the use of the money, property or benefits by that other entity (or any other entity) when determining whether the fund, authority or institution satisfies June the conditions in paragraphs (1)(b) and (c).³⁴

4.29 World Vision was highly critical of both provisions. In terms of the provisions for DGR payer entities, it posed the following questions:

There is no discussion as to what is expected in terms of tracing funds. How does the Payer Entity make sure how funds are used? What is meant by the

32 Ms Huang, Company Secretary and General Counsel, World Vision Australia, *Proof Committee Hansard*, 3 September 2012, p. 43.

33 Tax Laws Amendment (Special Conditions for Not-For-Profit Concessions) Bill 2012, p. 11.

34 Tax Laws Amendment (Special Conditions for Not-For-Profit Concessions) Bill 2012, p. 3.

use of the phrase “(or any other entity)”. This suggests having to trace through where the gift goes. How far? There is nothing in the Bill to indicate what happens if, despite the best efforts by a donor to satisfy itself re the use of funds, it is subsequently determined that they were used in a manner considered to be inappropriate? Is DGR status lost on a “go forward” basis? Is it lost on a retrospective basis? If so, do all donors need to be advised of same and amend their returns?³⁵

4.30 Neumann and Turnour also drew the committee's attention to the adverse affect that it claimed the tracing provisions would have on not-for-profit entities. Mr Mark Fowler, a Director at the firm, described the amendment as 'an entirely new provision' that is not currently in the ITAA.³⁶ He argued that there is 'great uncertainty' in how the provisions would operate, that they will be an added administrative burden and that they may penalise donors for the actions of a third party. Specifically, Mr Fowler foresaw the following possibility:

...if charity A gives funds to non-exempt entity B under the understanding that they will be expended in Australia and then two years later entity B changes its intent with those funds and sends them overseas, charity A may lose its charitable endorsement.³⁷

4.31 Mr Fowler posed the following questions to the committee to illustrate his concern with how the provision will operate and the administrative burden it would pose on NFPs ensuring they retain tax exemptions and DGR status:

If charity A is a DGR, the question arises: at what date should it lose its endorsement? Should it be the date on which it provided the funds to entity B, or should it be the date that entity B sends the funds overseas? If it is the date on which it first provided the funds, what happens to all those individuals who gave on a deductible basis? Is their deductibility written back to that date and do they have to resubmit returns for that applicable period? Is there a cut-off period in the consideration of when entity B sends the funds off overseas, so do we wipe the slate clean at year 2 or year 5 or year 10? For how long does entity A need to trace the hands in the funds of entity B?

...

If charity A gives funds to an entity that is endorsed as exempt but it is later discovered that that entity should not have been endorsed, should there also

35 World Vision Australia, *Submission 29*, p. 18.

36 Mr Mark Fowler, Director, Neumann and Turnour, *Proof Committee Hansard*, 3 September 2012, p. 32.

37 Mr Mark Fowler, Director, Neumann and Turnour, *Proof Committee Hansard*, 3 September 2012, p. 32.

then be a backdating even though charity A relied upon the knowledge that it had at the relevant time in giving the gift?³⁸

4.32 Neumann and Turnour advocated that if subsection (4) of the TLAB remains, it should be replaced with a deeming provision that requires a charity to show it has made sufficient investigation and it was satisfied on reasonable grounds that the money will be spent in Australia. In this way, it argued, the backdating provisions and administrative burdens are avoided.

4.33 As Neumann and Turnour itself noted in evidence to the committee, this standard is established in the EM. The EM states that a donor entity will generally give money for a particular purpose or cause, and the entity will know where this purpose or cause is intended to be carried out.³⁹

Committee view

4.34 The committee believes that the concerns of those submitters who claim the tracing provisions in the TLAB will be too onerous and too complex are overstated. The committee highlights the EM's clear guidance that 'the requirement should present no greater an obligation on entities than already exists under charity law and the existing ATO endorsement framework'. Further, the EM states that if an income tax exempt entity gives money to another income tax exempt entity, the receiving entity will itself have met the 'in Australia' special conditions and be operating principally in Australia. In this case, an entity does not need to take account of the eventual use of the funds.⁴⁰

4.35 The committee does believe that the ATO should release guidance material for the not-for-profit sector on the tracing provision. This material should clarify that a not-for-profit entity that passes funds to another need not rigorously check the use of those funds by the recipient for a prolonged period to meet the 'in Australia' conditions. Rather, the test should be that the donor has reasonable grounds—having made inquiries—that the funds spent by the recipient are principally 'in Australia'. To this end, the guidance material should contain examples which go to the concerns of stakeholders.

4.36 The EM is clear that the ultimate intent of the provision is to prevent the situation that the High Court accepted in its 2008 Word Investments finding. In other words, there is a responsibility for the donor to check that the funds are being used principally in Australia if it is to have tax exempt status. The committee does not

38 Mr Mark Fowler, Director, Neumann and Turnour, *Proof Committee Hansard*, 3 September 2012, p. 32.

39 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 paragraph 1.76.

40 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, p. 20.

believe that this responsibility involves backdating and ongoing monitoring of a recipient not-for-profit entity's expenditure.

Recommendation 4.1

4.37 The committee recommends that the Australian Taxation Office circulate guidance material relating to Schedule 1, Item 38 of the Taxation Laws Amendment (Special Conditions for Not-for-Profit Concessions) Bill 2012. This material should be developed in consultation with stakeholders and should provide examples which illustrate the responsibilities of donors in checking recipient entities' expenditure.

The definition of a not-for-profit entity

4.38 Clause 44 of the TLAB contains a definition of a 'not-for-profit entity' for tax law purposes. An entity is a not-for-profit entity if:

- (a) it 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.⁴¹

'Does not distribute its profits to its members'

4.39 Some witnesses expressed concern at the phrase 'does not distribute its profits or assets to its owners or members'. They argued that there are many legitimate examples of charities and not for profits distributing profits to their members that would, under the proposed legislation, lose their tax exempt status.

4.40 The Salvation Army expressed concern that the EM states that the definition of the word 'distributing' in clause 44 takes the broader dictionary definition and not the definition in the ITAA. It argued that by widening the definition of distribution:

...there is a risk an organisation will be in breach of the definition if they provide their charitable services to a 'member' as these services could fall within either the definition of 'property' or 'other benefits' (it is noted

41 Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, pp 14–15. Emphasis added.

intangible property and benefits would be caught in these definitions) of the organisation.⁴²

4.41 The Salvation Army gave the example of a church congregation where the members of the church are the users of the church 'property' and recipients of the benefits of the organisation on a frequent and regular basis. It feared that the church would lose its tax exempt status. The Salvation Army did note that it is possible that this type of example is an unintended consequence of the definition.⁴³

4.42 The law firm Neumann and Turnour gave the example of:

An indigenous corporation [that] provides accommodation for homeless; it provides around 300 meals per month and uses its bus to transport people to and from its facilities. It does not discriminate between members and non-members in using these facilities. In fact, it encourages everyone it touches to become a member and have a say in its governance structures. The charity will lose exemption.⁴⁴

4.43 In evidence to the committee, Mr Mark Fowler of Neumann and Turnour gave the example of an organisation raising \$70 000 for flood victims. He argued that under the proposed definition in the TLAB, the organisation would lose its tax exempt status because it did not discriminate between members and non-members in the area and it provided more than half of the funds to people who were members.⁴⁵

4.44 World Vision expressed the same concern:

Our view is that the proposed definition of “not-for-profit entity” in the proposed sub-section 995-1(1)(a) of the Tax Bill is too narrow. To be a “not for profit entity”, the entity must not be carried on for the profit or gain of its owners or members while operating or upon winding up. If an organisation has members who fall into the category of beneficiaries that the organisation has been established to assist, this would preclude the organisation from assisting such members.⁴⁶

4.45 World Vision argued that a better definition of a 'not for profit entity' is an entity:

...whose assets and income are applied solely in furtherance of its objects and not distributed directly or indirectly to the owners or members of the organisation except as bona fide benefits in furtherance of its objects, compensation for services rendered or expenses incurred on behalf of the

42 The Salvation Army, *Submission 34*, p. 4.

43 The Salvation Army, *Submission 34*, p. 4.

44 Neumann and Turnour, *Submission 22*, p. 3.

45 Mr Mark Fowler, Director, Neumann and Turnour, *Proof Committee Hansard*, 3 September 2012, p. 35.

46 World Vision, *Submission 29*, p. 19.

organisation; and profits are used to carry out its purposes and not distributed as profits to its owners, members or another party.⁴⁷

'Similar purpose'

4.46 The Australian Catholic Bishops Conference raised a query about the expression 'similar purpose' in proposed subsection 995-1(1) of the ITAA. Father Brian Lucas told the committee:

The explanatory memorandum, in paragraph 1.86 gives an example of a distribution from charity to charity. What is not so clear in the legislation—this could be improved—is that we are talking about charity to charity, not a particular purpose of charity.⁴⁸

...

It might be that some tweaking of the wording in defining 'similar purpose' will solve that problem. It also does not address the two different capacities in which a person may get a benefit from a charity: their capacity as citizen like any other citizen; and their capacity as a member or director or committee member or trustee, which can be a different capacity, and that could give rise to different tests.⁴⁹

Treasury's view

4.47 The committee asked Treasury for its response to these criticisms of the proposed definition of a 'not-for-profit entity'. Treasury drew the committee's attention to the definition of a not-for-profit company in various Acts including the *Fringe Benefits Tax Act* and the *Income Tax Act 1986*. In these statutes, the definition is a company that is not carried on for the purposes of profit or gain to its individual members and is prohibited from making any distribution to its members. Treasury told the committee: 'We would contend that the intention that is there in the proposed bill is to restore the intention in the current law'.⁵⁰

4.48 Moreover, Treasury contended that the criticism of the proposed definition is based on a misunderstanding of how the provision should be interpreted. It told the committee:

In effect, a not-for-profit entity that makes a surplus does not mean that it is not a not for profit. So long as the surplus is applied for the not-for-profit purposes and the profit does not accrue to the benefit of identifiable members either directly or indirectly. That is a long-standing concept of what are not-for-profit entities. In the past, not-for-profit entities have been

47 World Vision, *Submission 29*, p. 19.

48 Father Brian Lucas, *Proof Committee Hansard*, 3 September 2012, p. 24.

49 Father Brian Lucas, *Proof Committee Hansard*, 3 September 2012, p. 29.

50 Mr Martin Jacobs, Acting Principal Adviser, Indirect, Philanthropy and Resource Tax Division, Treasury, *Proof Committee Hansard*, 3 September 2012, p. 48.

prohibited from distributing to owners and members and this requirement is nothing new and is effectively at the heart of what a not-for-profit entity is.⁵¹

The committee's view

4.49 The committee believes that the criticisms of the proposed definition of a 'not-for-profit' entity' in clause 44 of the TLAB are overstated. That said, it is important to allay any stakeholder concerns. Accordingly, the committee considers that that the Treasury should issue clear guidance material that:

- states the intent and the intended consequence of the definition;
- states that the definition is intended to align with definitions of a 'not-for-profit company' in other statutes; and
- clarifies that where entities return any surplus to the not-for-profit purpose, the entity shall not lose its tax exempt status.

Recommendation 4.2

4.50 The committee recommends that Treasury issue guidance material in relation to proposed section 995-1(1) of the *Income Tax Assessment Act 1997*. This material should:

- **state the intent and the intended consequence of the definition;**
- **state that the definition is intended to align with definitions of a 'not-for-profit company' in other statutes; and**
- **clarify that where entities return any surplus to the not-for-profit purpose, the entity shall not lose its tax exempt status.**

4.51 The committee believes that the EM's definition of the words 'similar purpose' makes clear that this encompasses a charity that gives to another regardless of their individual charitable purposes. It clearly states that a charity can utilise a different not-for-profit as a means to carry out or give effect to its charitable purpose.⁵²

A final comment

4.52 The committee notes that the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill is in its third iteration having undergone two drafts and consultative processes before this inquiry. While it was important that stakeholders had an opportunity to voice their concerns, the committee does not believe that the bill itself should be amended or delayed. It is important that the

51 Mr Martin Jacobs, Acting Principal Adviser, Indirect, Philanthropy and Resource Tax Division, Treasury, *Proof Committee Hansard*, 3 September 2012, p. 48.

52 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, p. 21.

guidance material that the committee has recommended is based on careful consultation with stakeholders to clarify any areas of confusion.

Recommendation 4.3

4.53 The committee recommends that the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 be passed.

Ms Deborah O'Neill MP

Chair

Coalition Members and Senators Dissenting Report

1.1 The Committee's inquiry covered a package of three related bills: the Australian Charities and Not-for-profits Commission Bill 2012, the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 and the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012.

1.2 The bills establish the Australian Charities and Not-for-profits Commission (ACNC), the role of the Commissioner of the ACNC and make provision for the not-for-profit sector's eligibility for taxation concessions.

1.3 The Coalition members of the Committee do not support passage of any of the three bills.

1.4 The Preamble to the Australian Charities and Not-for-profits Commission Bill 2012 states:

It is important that a national regulatory system that promotes good governance, accountability and transparency for not-for-profit entities be introduced to maintain, protect and enhance public trust and confidence in the not-for-profit sector.¹

1.5 Coalition members of the Committee do not accept that the current Commonwealth regulatory regime, based on the activities of the Australian Securities and Investments Commission and the Australian Taxation Office, is broken, and therefore do not accept the premise for this new regulatory megastructure.

1.6 We are unpersuaded by claims that this reform will reduce the regulatory burden faced by the sector.

1.7 First, it adds a layer of Commonwealth regulation to many charities and not-for-profits which are currently regulated by State and Territory governments – and there is no agreement from the States and Territories to exit the field.

1.8 Secondly, even at the Commonwealth level alone we doubt that it will reduce red tape. In theory it is plausible that the ACNC could be a 'one stop shop' and other agencies could make grants to charities registered with the ACNC in reliance on information already provided to the ACNC. In practice, this would require a remarkable and highly unlikely change in bureaucratic behaviour.

1.9 We note that representatives of long-established, large, reputable organisations in the charity and not-for-profit sector told the Inquiry of their concerns that the promised reduction in red tape will not be delivered.

1 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, p. 8.

1.10 Father Brian Lucas of the Catholic Church put it very well:

Much has been said about the need for reduction of red tape. That was very much the rationale that led a number of the various government inquiries to recommend a national regulator. You will have heard, I am sure, that there is still concern in many sectors that particular legislation that we are now dealing with does not bring about the reduction of red tape that was envisaged.²

1.11 The Coalition members support the establishment of a small Charities Commission as an educative and training body for the sector.

1.12 The Coalition, however, will not support the creation of another regulatory body that will add to the red tape burden for charitable organisations and simply duplicate the existing State and Territory regulation.

1.13 The following submissions to the Committee are indicative of the opposition to a large and intrusive bureaucracy that fails to deliver a reduction in red tape:

Mission Australia

Mission Australia remains concerned that the bills as drafted are more prescriptive in certain key areas than had been foreshadowed and do not reflect that sufficient work has been done with Federal agencies and with State Governments and agencies with responsibilities in the charitable sector to reduce red tape and duplication. In addition, greater attention should be given to ensuring the independence of the charity and not-for-profit sector.

Mission Australia submits that the legislation needs further amendment to reflect clearly the Government's views and the views of the charity sector that governance standards to be established by regulation should be principles-based and not prescriptive.³

Australian Catholic Bishops Conference

The ACBC is therefore sceptical about the wisdom of accepting an initial increase in red tape in the hope that it may be reduced in the future. The ACBC looks to the Commonwealth to obtain assurances from the states and territories and a published timeline committing to a reduction in red tape at the national level.

The ACBC remains concerned the legislation to be examined by the committee does not reduce red tape and in fact increases red tape for the sector. This is contrary to the stated objectives of the legislation.⁴

2 Fr Brian Lucas, Australian Catholic Bishops Conference, *Proof Committee Hansard*, 3 September 2012 p. 3.

3 Mission Australia, *Submission 12*, pp. 2- 4.

4 Australian Catholic Bishops Conference, *Submission 17*, p. 3.

National and State and Territory Peak Bodies for Volunteering

Of significant concern is the duplication and overlap between Commonwealth and State and Territory laws governing the not-for-profit (NFP) sector. This is perceived by some in the sector to be a major contributor to the compliance burden issues endured by NFP agencies.

The ACNC is meant to relieve these compliance burden issues by providing a 'one-stop' regulation shop. However it is argued by some that red-tape reduction cannot be achieved without collaboration between Federal and State and Territory governments. It is feared that unless the governments harmonise their laws in relation to the regulation of the NFP sector the creation of the ACNC will result in a further layer of compliance for charities.

A number of NFP agencies expressed their concern about this matter during the consultation process for the legislation and the national and state and territory volunteering peak bodies also express their concern about this matter. While we understand conversations are taking place between state and territory authorities and the ACNC taskforce, harmonisation between the two levels of government is some time away.⁵

1.14 Witnesses pointed to the fact that the Bill unnecessarily duplicates existing laws in key areas.

Mrs Fletcher: ... Here it is asking the ACNC to regulate anti-money-laundering and counterterrorism laws when the reality is that there is already a whole body that does that—in relation to everybody, not just in relation to charities. So our primary preference would be that it stays the way it is now and that the ACNC is not also required to operate in this space. Our concern is that if it does then we could end up in a situation where we have different standards and different laws operating in relation to what we have now.

Mr FLETCHER: So you would say that this is unnecessary regulatory duplication when there is already a regime to deal with this.

Mrs Fletcher: Exactly.⁶

1.15 There is also a concern that the smaller charities that rely on the active participation of volunteers will be overcome by the approach that the package of bills adopts.

1.16 The Government's level of engagement with and outreach to the smaller entities in the charitable sector has been called into question.

The Government in the explanatory memorandum (some 325 pages) says it will consult with stakeholders and peak bodies yet as no analysis has been

5 National and State and Territory Peak Bodies for Volunteering, *Submission 19*, p. 1.

6 Tanya Fletcher, World Vision Australia, *Proof Committee Hansard*, 3 September 2012, p. 43.

done of the small organisations to see if they are represented by peak bodies.⁷

1.17 The sheer volume of the legislative package is overwhelming for those smaller entities that are unable to afford to pay for compliance officers.

1.18 This point was made in a submission by reference to experience with a small 'religion' charity incorporated under the Associations Incorporation Act (NSW), which currently has a legislative compliance burden comprising 44 pages of legislation, in contrast with the size of the package of bills before the Committee:

The proposal in the Bill means not only does it have to comply with the NSW legislative requirement, but 152 pages additional pages of legislation and an unknown number of pages of unknown regulations. There are also some 325 pages of explanatory memorandum. It is hard to see how this leads to simplicity and clarity. ...

The end result for this small incorporated association run by volunteers rather than 44 pages of legislation and regulation it would have to add 290 pages of legislation and 465 pages of explanatory memorandum and an unknown number of pages of unknown regulations just to be sure it complied. It would also be aware that it is intended to define Charities in legislation in the future.⁸

1.19 The oral evidence of Dr Brian Primrose to the Community Affairs Legislation Committee makes this point as well:

The bill needs to be written in such a way that it is easy to understand for the bulk of not-for-profit leaders who are not at all sophisticated in dealing with legislation.

Around this table everybody lives and breathes legislation, but the majority of not-for-profit leaders do not. It is not in their comfort zone and they would rather not engage with it.

It is seen as being something that is technical, confusing, complex and difficult.⁹

1.20 The Coalition wants to encourage volunteers. It is volunteers who make the not-for-profit sector strong and effective.

1.21 We do not want to see people turning their back on their local charity, religious support group or other participant in the sector because of fear of legal action that might be assumed as a responsible entity or director of a not-for profit entity.

7 John Church, *Submission 33*, p. 2.

8 John Church, *Submission 33*, p. 2.

9 Brian Primrose, Primrose Solutions, *Proof Committee Hansard*, 4 September 2012, p. 1.

1.22 For this reason we say that in relation to the power to remove directors, the approach in the ACNC Bill is not ‘light touch’ as claimed. The Coalition supports World Vision Australia’s submission:

... in most instances, under the Corporations Act 2001 (Cth), ASIC must seek a court order before a director can be disqualified from managing a corporation. WVA suggests this is a more appropriate model and can see no case for why a different approach should be taken in respect of registered NFP entities.¹⁰

1.23 Unless and until there is harmonisation of various Commonwealth, State and Territory laws, the proposed ACNC simply adds another layer of regulation and bureaucracy on the sector.

1.24 At present no State or Territory government has proceeded beyond merely expressing a commitment to red tape reduction.

1.25 Indeed the evidence given to the Committee by the Interim Commissioner of the ACNC Taskforce was that no State or Territory government had yet entered into a memorandum of understanding with the Commonwealth to participate in the new regulatory arrangements.

1.26 The smooth functioning of the ACNC is also dependent on a number of Commonwealth Departments agreeing to either hand over their regulatory powers to the ACNC, or to harmonise their regulatory requirements with the ACNC.

1.27 This issue is of particular concern to independent schools, which will be required to report much of the information to the ACNC that they currently report to the Department of Education and Workplace Relation (DEEWR), as well as to state education authorities.

1.28 If an information-sharing agreement is not reached between the ACNC and DEEWR, the ACNC will effectively serve as an additional layer of regulation and red tape for independent schools many of whom are already drowning in compliance.

1.29 Coalition members of the Committee are mindful of the independent schools’ submission:

Schools are already under a considerable reform pressure in relation to funding, curriculum and potential reporting reforms (DEEWR and ACARA).

As an already highly regulated charity, each non-government school (both independent and Catholic) must now comply with the proposed new range of ACNC regulatory reforms proposed by the Commonwealth Government.

10 World Vision, *Submission 29*, p. 15.

Government schools will not be required to comply with the ACNC regulatory structure.

... ISCA still has a number of unresolved legislative issues with potential impacts on non-government schools and additionally is concerned with the speed at which these proposed changes are being implemented.¹¹

1.30 There was evidence from a number of witnesses at the Committee's hearing that there were important gaps in the Bills. The Institute of Chartered Accountants in Australia identified two such gaps: the governance requirements and the reporting framework. Since these areas of administration and process are integral to the proper functioning of the proposed new legislative arrangements the ICAA submitted that they must be clarified before the legislation commences.

1.31 The need for clarification of the reporting requirements was also emphasised by the Not For Profit Accounting Specialists who submitted:

In relation to reporting requirements, there are no details in the legislation as to what will be required – it simply refers to accounting standards, but as to whether General Purpose Financial Statements (GPFS) or Special Purposed Financial Reports (SPFR) are required, we are none the wiser. ...

If they [charities] were required to prepare full GPFS it would significantly increase the cost of reporting, and would not necessarily enhance the reader's understanding of the reports.

We would like to see the regulations clearly state which type of financial report is applicable for each type of entity.¹²

1.32 The Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 Bill affects many important definitions and eligibility conditions applicable to entities that seek tax exempt status or DGR status.

1.33 The Government has undertaken insufficient preparation to have these key provisions ready for commencement from the income years following Royal Assent.

1.34 The oral evidence of Dr Matthew Turnour of legal firm Neumann & Turnour is emphatic:

... in relation to what I will call the not-for-profit definition legislation, or the 'in Australia' legislation, there is no urgency on this draft bill.

We know that the government has announced that there will be a charities definition bill coming through soon.

Why not hold off the definition of not-for-profit and deal with it as part of a charities and not-for-profit definition bill?¹³

11 Independent Schools Council of Australia, *Submission 15*, p. 4.

12 Not For Profit Accounting Specialists, *Submission 5*, p. 2.

13 Matthew Turnour, Neumann & Turnour Lawyers, *Proof Committee Hansard*, 3 September 2012, p. 35.

1.35 In conclusion, the Coalition members of the Committee are unable to support passage of these bills because the mischief that the main bill seeks to address has not been adequately identified and the claims that it will deliver a reduction in red tape are wholly implausible. Its real effect will be to do the opposite – that is to impose an additional costly compliance regime, when the sector already faces enough red tape.

Recommendation:

That the Bills not be passed in their current form.

Senator Sue Boyce

Senator Mathias Cormann

Paul Fletcher MP

Tony Smith MP

Additional Comments by the Australian Greens

Introduction

1.1 This package of Bills provides a framework for reform in the Not-for-profit sector, by introducing an Australian Charities and Not for Profit Commission (ACNC) with powers to both register and regulate charities for the purpose of ensuring that they use their assets and income effectively and efficiently as well as powers to reduce the burden of regulatory compliance.

1.2 Following an inquiry by the Joint Committee into the Government amendments to the package of Bills, the Australian Greens support the recommendations in the majority committee report, however there are still some other key elements that need to be addressed before these Bills are passed and therefore make these additional comments to that report.

1.3 There has been limited time to adequately review this legislation and the Australian Greens are likely to make further comments in the Senate Community Affairs Reference Committee inquiry that has run parallel to the Joint Standing Committee Inquiry.

Reducing Red-tape

1.4 One of the significant opportunities present by establishing an ACNC is the possibility of reducing the regulatory burdens on our not-for-profit sector by providing a mechanism by which charities can use reporting to the ACNC to satisfy other reporting obligations.

1.5 Not-for-profit organisations currently have to report across a number of Commonwealth Departments and comply with State legislation; depending on the size of the organisation and how many jurisdictions it operates across, the reporting and compliance burden can present a significant administrative cost to the organisation.

1.6 As it presently stands, this Bill sets the framework for greater harmonisation and the 'report once, use often' charities passport but also introduces a new level of compliance for many not for profit entities by including a new requirement to report to the ACNC without having yet removing other obligations.

1.7 While Section 130-5(2) refers to the annual reporting obligations of the ACNC, which reflect current practice for Government agencies to provide detailed reports of their annual expenditure and achievements, and the Government has amended the Bill to provide a five year review of the ACNC's performance, it is the view of the Australian Greens that the ACNC should also be required to report its progress against an established timeline for harmonisation both across federal departments and with states.

Recommendation 1.1

1.8 That the ACNC develop a timeline for reducing red-tape and that the ACNC provide a yearly report to the Parliament that details its work towards reducing the regulatory burden on not-for-profit entities

Governance Standards and External Conduct Standards

1.9 45-10(1) specifies that that the Governance Standards, which registered entities must abide by in order to maintain their registration, shall be determined by regulation.

1.10 50-10(1) specifies that that the External Conduct Standards, which registered entities must abide by in order to maintain their registration, shall be determined by regulation.

1.11 The Australian Greens believe that these standards should be contained within legislation rather than devolved to regulations.

1.12 In recognition of the significant work to be undertaken to establish the Governance and External Conduct Standards, it would be appropriate to develop and bring forth a separate schedule with these details after the ACNC has been established and has had an opportunity to undertake further consultative work.

1.13 This is reflective of the position of ACOSS who submitted that the Bill should include a requirement to conduct a certain amount of negotiations in good faith with the sector with the aim of producing a mutually agreed set of governance standards.

1.14 The Australian Greens also support the ACOSS recommendation that the Bill should require these governance standards to preserve the independence of charities and not-for-profit organisations to decide how to run themselves, so long as those decisions do not infringe the ACNC's capacity to operate and fulfill its functions.

1.15 ACOSS propose the following be inserted at provision 45-10, along the following lines:

(6) However, the governance standards must deal only with the minimum standards required to meet the objects of the Act and must:

(a) be principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation;

(b) be in proportion to the size of the organisation and the level of financial, organisational and reputational risk;

(c) preserve the independence of charities and not-for-profit organisations to decide how to run themselves, so long as those decisions do not infringe the ACNC's capacity to operate and fulfill its functions;

(d) not prevent or constrain not-for-profit organisations from carrying out advocacy functions in pursuit of their purpose; and

(e) where possible, not duplicate any regulatory requirement already in place.

Recommendation 1.2

1.16 That consultation with the not-for-profit sector is a condition of establishing and subsequently changing the Governance and External Conduct Standards.

Recommendation 1.3

1.17 That the ACNC establish in the Bill a requirement to consult in good faith with the not-for-profit sector about the Governance and External Conduct Standards.

Recommendation 1.4

1.18 That these standards become a schedule of the legislation rather than as regulations.

Recommendation 1.5

1.19 That the current Bill insert an additional section after 45-10 (5) that reflects the suggestions made by ACOSS for this section.

Recommendation 1.6

1.20 More-likely-than-not as a factor in triggering the Commissioner's powers

Revoking registration

1.21 The Commissioner has the power to revoke registration under section 35-10(1)c, which can be triggered by a belief that a not-for-profit is more-likely-than-not to contravene the governance or external conduct standards.

1.22 There is also a statement of factors to which the Commissioner must have regard when revoking registration, including the provision at 35-10(2)e which requires the Commissioner to have regard to the extent to which the registered entity is conducting its affairs in a way which may cause harm to, or jeopardise, the public trust and confidence in the not-for-profit sector.

1.23 Similarly, Section 15-10 of the ACNC Bill outlines matters that the commissioner must have regard to when exercising their powers and functions, which includes 'the maintenance, protection and enhancement of public trust and confidence in the not for profit sector.'

1.24 The Australian Greens are concerned that these provisions give the Commissioner too much power to take pre-emptive enforcement action when an organisation has not as yet breached the conduct standards, and to look beyond

specific breaches of legal liability and responsibility toward subjective judgments about how the not-for-profit sector should operate.

Other Enforcement Powers

1.25 The Commissioner also has the power to issuing warnings, directions or undertakings as per 40-5(1)f, which can also be triggered by a belief that a not-for-profit is more-likely-than-not to contravene the governance or external conduct standards.

1.26 The more-likely-than-not terminology provides the Commissioner with excessive powers and should be removed, particular if other concerns regarding the establishment of governance and external conduct standards are not resolved.

Recommendation 1.7

1.27 Remove the more-likely-than-not terminology and the have regard to public trust and confidence section from the Bill.

Publishing enforcement actions online

1.28 The Commissioner must publish online all warning notices and directions and undertakings, as well as suspensions of registration. The published notices remain on the website for 5 years and have the potential to result in serious reputational damage for the organisations they were issued against, particularly if the more-likely-than-not triggers for enforcement action remain in the legislation.

1.29 While the more-like-than-not provisions remain in place, the Australian Greens consider this to be a power that has the potential to undermine rather than build public trust in the not-for-profit sector.

Tax Bill

Definition of Not-For-Profit

1.30 The Australian Greens are concerned with the definition of not-for-profit that is set forth in this Bill.

1.31 The Australian Greens have particular concern with the wording in Schedule 1, Provision 3, Section 44, which refers to not-for-profits 'not being carried on for the profit of gain of its members'. Evidence submitted to the committee suggests that this can potentially undermine the capacity of organisations, such as disability service organisations, to recruit members who benefit from the services of the organisation to the organisation's board.

1.32 The Majority Committee report also acknowledges the difficulty of this wording, and recommends that the tax office issue additional advice regarding the interpretation. The Australian Greens are concerned that the definitions are

insufficient and should be amended within the text of the Bill as well as being supported by additional treasury advice.

1.33 The Australian Greens acknowledge that additional work is being undertaken to review and reform the statutory definition of a charity, and recommend that the elements of this Bill that can be deferred until that legislation is completed should be deferred and then reviewed in light of that legislation.

Recommendation 1.8

1.34 Defer the elements of this Bill that can be deferred until the complimentary Charities definition legislation is completed in order to review the not-for-profit definition in light of that legislation.

In Australia Provisions

1.35 The Australian Greens retain some concerns about the application of the In-Australia provisions. These concerns include, but are not limited to, the application of these rules to touring arts organisations and the responsibilities of a registered entity to ensure that monies distributed to another entity are not subsequently sent overseas.

1.36 The majority Committee report also acknowledges some of these difficulties and recommends that the tax office issue additional advice regarding the interpretation of these provisions. The Australian Greens are concerned these issues should be resolved within the text of the Bill as well as being supported by additional treasury advice.

Recommendation 1.9

1.37 Resolve and clarify the in-Australia provisions within the text of the Bill

Senator Rachel Siewert

Appendix 1

Submissions received

- 1 The Smith Family
- 2 The George Institute for Global Health
- 3 Chartered Secretaries Australia Ltd
- 4 UnitingCare Australia
- 5 Not for Profit Accounting Specialists
- 6 Dr Ted Flack
- 7 Australian Association of Medical Research Institutes
- 8 YWCA Australia
- 9 Research Australia
- 10 ACOSS
- 11 Community Council for Australia
- 12 Mission Australia
- 13 Australian Baptist Ministries
- 14 National Roundtable of Nonprofit Organisations
- 15 Independent Schools Council of Australia
- 16 Executive Council of Australian Jewry
- 17 Australian Catholic Bishops Conference
- 18 Jewish Communal Appeal
- 19 Volunteering WA
- 20 Catholic Health Australia
- 21 Fundraising Institute Australia
- 22 Neumann and Turnour Lawyers
- 23 Australian Major Performing Arts Group

- 24 Australian Institute of Company Directors
- 25 Jewish National Fund of Australia Inc.
- 26 Conservation Council of South Australia
- 27 Institute of Chartered Accountants Australia
- 28 Anglican Church Diocese of Sydney
- 29 World Vision Australia
- 30 Moore Stephens Australia
- 31 The Treasury
- 32 ANGLICARE Sydney
- 33 Mr John Church
- 34 The Salvation Army
- 35 Makinson and d'Apice Lawyers
- 36 Live Performance Australia
- 37 Philanthropy Australia
- 38 Uniting Church
- 39 Not-for-Profit Sector Reform Council
- 40 CPA Australia
- 41 Australian Council for International Development
- 42 The Not-For-Profit Project, University of Melbourne Law School
- 43 Department of the Prime Minister and Cabinet
- 44 Australian Centre for Philanthropy and Nonprofit Studies
- 45 Western Australian Council of Social Services Inc.
- 46 RSPCA
- 47 Financial Services Council

Additional information received

- Document 1 tabled by The Treasury at a public hearing in Canberra on 3 September 2012
- Document 2 tabled by The Treasury at a public hearing in Canberra on 3 September 2012
- Document tabled by Dr Matthew Turner at a public hearing in Canberra on 3 September 2012

Answers to questions on notice

- Answers to Questions on Notice from The Treasury, public hearing, 3 September 2012, Canberra, received 3 September 2012

Appendix 2

Public Hearings and Witnesses hearing

Canberra, 3 September 2012

BAIRD, Mr Murray, Assistant Commissioner, General Counsel, Australian Charities and Not-for-profits Commission Implementation Taskforce

CROSBIE, Mr David, Chief Executive Officer, Community Council for Australia

FLETCHER, Mrs Tanya, Legal Counsel, World Vision Australia

FOWLER, Mr Mark, Director, Neumann & Turnour Lawyers

HAMPSHIRE, Ms Anne Catherine, Head of Research and Advocacy, The Smith Family

HICKS, Ms Kerry, Head of Reporting, Institute of Chartered Accountants Australia

HUANG, Ms Seak-King, Company Secretary and General Counsel, World Vision Australia

JACOBS, Mr Martin, Acting Principal Adviser, Indirect, Philanthropy and Resource Tax Division, Department of the Treasury

LAVARCH, Ms Linda, Chair, Not-for-Profit Sector Reform Council

LEGGETT, Mr Chris, Manager, Philanthropy and Exemptions Unit, Department of the Treasury

LUCAS, Reverend Brian, General Secretary, Australian Catholic Bishops Conference

PASCOE, Ms Susan Mary, Interim Commissioner, Australian Charities and Not-for-profits Commission Implementation Taskforce

RAM, Ms Ronita, Policy Analyst, Indirect, Philanthropy and Resource Tax Division, Department of the Treasury

RONALDS, Mr Paul, First Assistant Secretary, Office for Work and Family, Department of the Prime Minister and Cabinet

SHANNON, Mr Joe, Chairman, Not-For-Profit Group, Moore Stephens Australia

TURNOUR, Dr Matthew, Managing Director, Neumann & Turnour Lawyers

WARD, Mr David, Treasurer and Council Member, Philanthropy Australia

Appendix 3

Changes to the Australian Charities and Not-for-profits Commission Bill 2012: Government response to the recommendations of the House of Representatives Standing Committee on Economics [table prepared by Treasury]

Section of the Bill or Explanatory Memorandum	Reference	Committee recommendation	Change
Objects	ACNC Bill — Paragraph 15-5(1)(c)	Recommendation 1	A new object of the Act has been added to make clear the important role the ACNC will have in promoting the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.
Objects and Guide	ACNC Bill — Section 10-5 Explanatory Memorandum — Paragraphs: 1.85 to 1.99	Recommendation 2	The guide material has been altered so that it reflects that the Commissioner will support the transparency and accountability of the sector. The explanatory materials have been added to, in order to better explain the operation of elements of the objects clause.
Registration provisions and Chapter four – enforcement powers	ACNC Bill — Sections 35-15, 100-10 and 100-15	Recommendation 7	Improvements have been made to ensure that registered entities have the opportunity to respond to compliance concerns, including extending the requirements to issue ‘show cause’ notices unless the ACNC Commissioner, considering a number of factors, believes that immediate enforcement action is necessary.

Section of the Bill or Explanatory Memorandum	Reference	Committee recommendation	Change
			These changes ensure greater procedural fairness for registered entities, while also providing the Commissioner with the discretion to revoke registration or suspend or remove a responsible entity without giving the entity a show cause notice in appropriate circumstances
Governance standards	Explanatory Memorandum — Paragraphs: 5.37 to 5.42	Recommendation 4	Material has been added to the explanatory materials to explain that sector-developed codes of conduct for certain entities can be endorsed as part of the governance standards.
The Register	ACNC Bill — Subsection 40-5(2)	Recommendation 8	A requirement has been introduced to provide that the ACNC Commissioner must not publish details of enforcement action on the Register for a period of at least 14 days, unless it is in the public interest to do so earlier. This provides time for a registered entity to respond before such information is made publicly available. Such information entered on the Register will be removed after five years, unless the public interest requires that it be retained.
The Register	ACNC Bill — section 40-10(1)	Recommendation 5	A new regulatory power has been included in the Bill, to provide that the ACNC Commissioner must not include certain information on the Register in prescribed circumstances. This would allow regulations to be made to protect the privacy of private donors, such as those who maintain a private ancillary fund.
Obligations, liabilities and offences	ACNC Bill — Division 180	Recommendation 6	The provisions of the Bill governing obligations, liabilities and offences of incorporated and unincorporated entities have been redrafted to give effect to the Committee's recommendations.

Section of the Bill or Explanatory Memorandum	Reference	Committee recommendation	Change
			These have been revised to remove any criminal liability for directors of incorporated charities. They now also make clear that where there is a non-criminal contravention of the Bill, a director of an incorporated charity is only liable for any amount payable by the body corporate where this arises from a deliberate act or omission of the director involving dishonesty, gross negligence or recklessness.
Administrative penalties	Explanatory Memorandum — Paragraphs 13.137 to 13.162	Recommendation 9	Additional detail has also been added to the explanatory memorandum to clarify the Commissioner's discretion regarding the issuing of administrative penalty notices.
Transitional reporting arrangements	Schedule 1, subitem 10 of the ACNC Consequential and Transitional Bill	Recommendation 3	Transitional reporting arrangements have been included to allow the Commissioner to treat a statement, report or other document provided to another Australian Government agency as meeting the financial reporting obligations of a particular registered entity under the ACNC Act. This arrangement will apply until the 2014-15 financial year and can be extended by regulation.
Statutory review	Schedule 1, subitem 16 of the Consequential and Transitional Bill	Recommendation 10	Consistent with the Committee's recommendation the legislation will be reviewed after five years.

